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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 588

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADFORD DYEING ASSOCIATION (U. S. A.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR BRADFORD DYEING ASSOCIATION (U. S. A.), RESPONDENT

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OPINIONS BELOW

The opinions below are correctly cited in the Board's brief.

JURISDICTION

Jurisdiction is correctly stated in the Board's brief.

QUESTIONS PRESENTED

I. HAS THE NATIONAL LABOR RELATIONS BOARD JURISDICTION OVER RESPONDENT IN THIS CASE?

II. Does the Evidence and Law Support and Warrant the Board's Findings that Respondent Dominated and Interfered with the Formation and Administration of the Employees' Federation and Its Order?

III. Does the Evidence and Law Support and Warrant the Board's Findings of T. W. O. C. Majority Representation and of Refusal by Respondent to Bargain and Its Order?

IV. Does the Evidence and Law Support and Warrant the Board's Findings Concerning Nelson and Schofield and Its Orders Concerning Them?

STATUTE INVOLVED

The statute involved is correctly cited in the Board's brief and most of the pertinent provisions are contained in its Appendix A. These provisions, together with certain other provisions which we consider are or may be material, are contained in Appendix A of Respondent's brief.

STATEMENT OF THE CASE

The statement of the case presented on pages 3 through 9 of the Board's brief is correct except that the charges were filed by the Committee for Industrial Organization and not by the Congress of Industrial Organizations.

It should be noted that the Board in its statement of the case on pp. 5-7 of its brief recites its findings and order rather than to present a recital of what the evidence was. Since the Board's findings and order are only proper if supported by substantial evidence as viewed in the light of the decisions on the subject, we shall present in the course of our argument statements of and references to the evidence to show such findings and order were not warranted.

SUMMARY OF ARGUMENT

I

Respondent is engaged solely in the business of dyeing and finishing cotton, rayon and acetate piece goods which come to the plant in an unfinished state being designated as "in the gray", or gray goods, that being the condition in which goods come off the looms when manufactured (R-37).

After goods are finished, the customer then gives shipping instructions and the goods are shipped to any consignee to any place that customer designates. Receiving, finishing according to instruction, and shipping in accordance with customer's directions are the only interest that Respondent has in the goods (R-63).

The activities of Respondent do not affect commerce in such a close and intimate fashion as to be subject to Federal control and, hence, do not lie within the authority conferred upon the Board. The Act is, therefore, inapplicable to Respondent.

II

The testimony, when considered in the light of the applicable decisions as to evidence requirements (*Consolidated Edison Co. of New York, Inc.* v. *N. L. R. B.* 305 U. S. 197 and many Circuit Courts of Appeal cases cited hereinafter) are insufficient to support the Board's findings of domination of and interference with the formation and administration of the Federation. The evidence shows the Federation was initiated and carried forward by LeFanti and other employees. Even the claims by the Board of Respondent's expressed preference for a local union and of distribution of cards by supervisory officials, if the evidence were sufficient under the requirements, would still be permissible action. *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153; *Ballston-Stillwater Knitting Co., Inc.* v.

N. L. R. B., 98 Fed. (2d) 758. Neither on a definition of "domination" or "interference" nor on the decided cases are the Board's findings warranted. In the absence of proper evidence to support the Board's findings the Circuit Court very properly suggested (but did not order) that the Board adduce additional evidence by an election. *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 374; *Hammond* v. *Schappi Bus Lines, Inc.*, 275 U. S. 164, 171; 72 L.Ed. 218, 221; *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, No. 20, October Term 1939, decided December 4, 1939. The Circuit Court merely suggested the advisability of an election but did not order an election nor tell the Board how to conduct an election as a condition of ordering withdrawal of recognition from the Employees' Federation. *N. L. R. B.* v. *Falk Corporation*, No. 460, October Term 1939, decided January 2, 1940.

III

The Board's finding that Respondent violated Sec. 8 (5) of the Act by refusing to bargain collectively with the T. W. O. C. is not supported by substantial evidence; the Order requiring such bargaining should not be enforced.

1. A majority of Respondent's employees in an admittedly appropriate bargaining unit neither designated nor selected the T. W. O. C. as their representative. Respondent's contention that the T. W. O. C. cards signed by its employees neither designated nor selected that organization is supported by substantial evidence.

2. Respondent refused to bargain with the T. W. O. C. solely because the individual claiming to represent the T. W. O. C. and the majority of Respondent's employees refused to submit proof of his authority.

3. The Federation's admitted representation of a majority of Respondent's employees justified Respondent in bargaining

with the Federation. Such majority was not obtained as a result of Respondent's violations of Sec. 8 (1) and (2).

A majority of Respondent's employees never designated the T. W. O. C., but assuming such designation it clearly appears that by April 9 a majority had freely revoked such designation and chosen the Federation instead.

4. The order requiring Respondent to bargain with the T. W. O. C. should not be enforced because the evidence is undisputed that before the Board's order was entered a clear majority of Respondent's employees had freely revoked any designation of the T. W. O. C. as bargaining representative and selected instead the Associated Workers of Printing, Finishing, and Allied Industries, such revocation having been accomplished both by resignation from the T. W. O. C. and by affiliation with the Associated Workers of Printing, Finishing and Allied Industries.

National Labor Relations Board v. *National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2d)

National Labor Relations Board v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2d)

Hamilton-Brown Shoe Co. v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th).

5. There is no T. W. O. C. Local at Respondent's plant to carry out such an order, which if made would saddle upon the employees a representative not wanted by the majority and would confer upon a minority of Respondent's employees the right to bargain for the majority; such an order would defeat the policies of the Act both as to self-organization and collective bargaining by representatives of the majority.

IV

1. The discharge of Schofield and Nelson was not for C. I. O. activity, but for violation of the No Smoking rule in the case of Schofield, and in the case of Nelson for trespass, breach of rules, neglect of his work, interfering with the work of others, insubordination and defiance. The right to discharge for such reasons still remains under the Act. *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 47; *Associated Press* v. *N. L. R. B.*, 301 U. S. 103. The findings of the Board of discharge for C. I. O. activity are not only not supported by the evidence, but are directly contrary to the positive evidence.

2. The conduct of Nelson and Schofield thereafter in attempting to stage a sit-down strike and the conduct of Nelson in threatening to stop oil deliveries and threatening to blow up the spur track deprived them of any rights of reinstatement they might otherwise have under the Act. *N. L. R. B.* v. *Fansteel Metallurgical Corporation*, 306 U. S. 204. Their conduct was a different type from that in the Circuit Court cases cited by the Board in this connection.

3. Since Nelson would have been laid off anyway in September 1937, some three months before the order of the Board which was rendered December 22, 1937, that fact should have been considered by the Board in making its order. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *N. L. R. B.* v. *Carlisle Lumber Co.*, 99 Fed. (2d) 533.

ARGUMENT

I

RESPONDENT IS NOT SUBJECT TO THE ACT.

The facts relating to Respondent's business and the nature of its operations are not in dispute.

Respondent, a Rhode Island corporation doing business in the Village of Bradford in the Town of Westerly, Rhode Island, is and was at the time of the hearing engaged solely in the business of dyeing and finishing cotton, rayon and acetate piece goods which come to the plant in an unfinished state being designated as "in the gray", or gray goods, that being the condition in which goods come off the looms when manufactured (R-37).

Respondent owns none of the goods that it processes, all goods being owned by its customers who are commonly known as "converters", a converter being a person who buys gray goods, sends them to a finisher, has them finished, and sells them (R-38). When incoming goods are unloaded they rest in Respondent's warehouse until the converter sends in his orders for processing (R-45). As a general rule notice of what is to be done on the goods comes in soon after their arrival, but there are certain goods belonging to customers which have been there for some years and for which no processing orders have been received (R-45). The converter owns the goods during the time that they are in Respondent's plant for processing and apparently keeps them insured (R-38-9).

Respondent has only one office outside Rhode Island, viz., in New York City, where its employees, called "solicitors", who seek dyeing and finishing business, make their headquarters (R-40).

The only activity carried on in the New York Office is the solicitation of dyeing and finishing business (R-40). So-

licitors taking no orders (R-68). Respondent has approximately 200 customers within and without Rhode Island, more than half of whom are located outside Rhode Island, chiefly in New York City, with others in Philadelphia, Troy, Baltimore and Boston (R-41).

Goods reach Respondent in cases or burlap bales by truck and by train, customer paying the freight to Bradford. When goods are finished and shipped out the customer pays the freight. The plant has a spur track connecting with the New York, New Haven & Hartford Railroad over which freight comes in (R-42). Goods arrive in pieces of certain yardage, varying from 20 to 120 yards (R-43).

For the first six months of 1937 total yards processed were 29,000,000 (R-44), with a weekly payroll in April of approximately $19,000 (Bd. Ex. 13 A).

The operation performed by Respondent is described generally as follows: The gray goods or gray piece-goods are received from various mills on customers' orders and are processed in accordance with customers' instructions. The goods may be sent to respondent for bleaching, for dyeing to some color and for some other incidental thing; processing varies with different materials. Before processing the goods are stitched together, then they are given some cleaning or dyeing or bleaching operations and various finishing to procure a saleable piece of goods. Each order is given a number, the goods bearing that number throughout the plant. The time taken to process, dye and finish goods from the time they are received until ready for shipment varies quite a bit with the nature of the goods, but generally two to three weeks is an average delivery (R-61). Sometimes goods are processed in three days; other times it requires eight weeks or more (R-45), the length of time depending on what customer wants done to the goods. The stitching of pieces of goods together is entirely for the convenience of the plant in handling the goods (R-62). The customer buys goods wherever he

thinks best; with this Respondent has nothing to do and knows nothing about. The thing that Respondent is concerned with is that the gray goods come to its plant with certain instructions as to processing, dyeing, etc., which are carried on by it. When the goods are finished and ready to be shipped, they are at the customer's disposal. Customer then gives shipping instructions and the goods are shipped to any consignee to any place that customer designates. Receiving, finishing according to instruction and shipping in accordance with customer's directions are the only interest that Respondent has in the goods (R-63).

Respondent purchases colors and dyestuff used in dyeing and finishing (R-65); during the year 1936 it purchased such materials, including chemicals, dyestuffs and starches (R-49), 325,111 pounds for $355,856.00, or a little more than $1.00 a pound, approximately 60% in value and poundage of which came from points within Rhode Island and approximately 40% in value and poundage of which was shipped in from outside Rhode Island. Contracts are made only at Bradford (R-65, 68).

Respondent owns no trucks and carries no goods in or out of the State — all goods being brought in and carried out by carriers not its own (R-68).

While approximately 90% of all goods processed in 1936 and 1937 were shipped outside Rhode Island (R-47) only something over one-half of such goods came to Respondent from outside Rhode Island and only something more than one-half of the total income of Respondent during those years resulted from work done on goods that came from outside Rhode Island (R-44); in other words, slightly less than 50% of all goods processed were shipped to Respondent from mills in Rhode Island (R-44, 48), which yielded nearly one-half its total income.

The report to the Department of Commerce for 1935 showed wage-earners numbering 688 and wages of $604,614.86, exclu-

sive of salaried officers and employees. During the same year respondent's total receipts for dyeing and finishing were $2,026,156., slightly more than 1% of the total of the Department of Commerce figures shown for the industry in the United State, while the number of wage-earners was slightly less than 1% (R-67).

The yardage finished in 1936 was 57,430,946 yards. The yards of remnants sold in that year were 588,931, about 1% of total yardage (R-68). These remnants are small ends torn off of each piece of cloth due to their being sewed in processing and other yardage that is damaged in finishing. They are an incidental waste in the business (R-68) which are described as "rag ends". It is the general custom in the finishing business to allow a certain percentage of loss in finishing due to shrinkage, etc. (R-69), the reason being that when goods are put in wet or dyed in any way they are liable to shrink and in processing the ends are torn off. Customer expects to lose a certain percentage. There is no avoidance of such loss. Each piece of cloth must be sewed together with the result that the seams are of no use because not 100% perfect. Also damaged and ruined goods go to make up the remnants which are owned by Respondent and which are sold 90% to one customer in New York City and are shipped to him on his order. (R-70). This acquiring and selling of remnants is incidental to Respondent's business. It is also a custom of the trade to allow on certain types of goods a 3% working loss; on other types of goods, a 5% working loss. The remnants are not worth much (R-70). Whatever is recovered from the sale of the remnants in a way reimburses Respondent for damages that it has caused to goods in processing (R-70). The disposal of remnants by finishers is likened to the sale of junk or wastage by a metal-working plant (R-72).

Dyeing and finishing of goods for converters is the total of Respondent's business, the selling of remnants being inci-

dental. It sells no dyes or chemicals or anything of that nature (R-52, 53).

Fuel oil used at the plant is purchased within Rhode Island and delivered to the plant (R-54).

At the time of the hearing not half of the entire capacity of the dyeing and finishing industry was in use (R-55). If the plant had been shut down converters, that is the owners of the goods, could have had their goods dyed and finished without difficulty by other dyeing and finishing plants within Rhode Island, which at that time had a great deal of spare capacity (R-55).

Respondent's sole business is processing (R-57). It neither transports nor arranges for transportation in interstate commerce. That is done by the customer who orders his goods transported in interstate commerce to certain points, Respondent merely shipping to whatever point customer directs him to ship as agent for the customer (R-57).

There have been no labor disturbances since Mr. Summersby became President in 1932 (R-59).

Respondent contends that the foregoing facts establish the inapplicability of the Act to its business.

The limits of the Board's authority in dealing with labor practices are those "affecting commerce". The commerce contemplated by the Act being "interstate and foreign commerce in the Constitutional sense".

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; 81 L.Ed. 893, 908.

The term "affecting commerce" is one of exclusion as well as inclusion; the Board's authority is not extended to the relations of all industrial employers and employees, nor do the terms of the Act impose collective bargaining upon all industry—but reaches only what may be deemed to burden or obstruct interstate or foreign commerce. Only acts which directly burden or obstruct interstate or foreign commerce or

its free flow are within the reach of Congressional power. Acts having that effect are not rendered immune because growing out of labor disputes.

Whether commerce is affected so closely or intimately as to be subject to Federal control and so within the Board's authority is left by the statute to be determined "as individual cases arise". The question, therefore, is whether in the instant case the Constitutional boundary has been passed.

Jones & Laughlin, supra.

Goods are delivered carriage paid where they rest until processing orders are received from the owners. As to all such goods, interstate commerce ends with delivery to Respondent's warehouse.

The processing to which the goods are subjected is a purely local activity.

When processing is completed and the finished goods are ready for shipment they continue to rest in Respondent's plant out of interstate commerce until shipping instructions are received from their owners.

Slightly less than 50% of all goods processed by Respondent in 1936 and 1937 were shipped to it from within Rhode Island; and about 90% thereof (or approximately 45%) when finished were shipped outside Rhode Island (R-44, 47, 48). These goods were never in commerce. *Carter* case, *infra*. Thus, only about 45% of all goods processed came from outside Rhode Island and were ultimately shipped outside Rhode Island. Under the decision in the *Schecter* case, *infra*, all goods that came from outside Rhode Island, which were consumed in Rhode Island, were not in commerce.

> "The Federal regulatory power ceases when interstate commercial intercourse ends; and correlatively the power does not attach until interstate commercial intercourse begins."
>
> *Carter Coal Company* case, *infra*.

Respondent contends that under these circumstances its activities do not so closely or intimately affect commerce as to fall within the Act.

Carter v. *Carter Coal Company*, 298 U. S. 238; 80 L.Ed. 1160.

Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495; 79 L.Ed. 1570.

At the time of the hearing not half the entire capacity of the dyeing and finishing industry was in use (R-55). If Respondent's plant had then shut down, converters, that is, the owners of the goods, could have had their goods finished without difficulty by other finishing plants within Rhode Island, which at that time had a great deal of spare capacity. (R-55).

Respondent is aware of the case of *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601; 83 L.Ed. 1014. In that case the Court said (p. 602):

> "This petition raises the question whether the National Labor Relations Act is applicable to employers, not themselves engaged in interstate commerce, who are engaged in a relatively small business of processing materials which are transmitted to them by the owners through the channels of interstate commerce and which after processing are distributed through those channels."

In that case it appeared that throughout the year there was normally a continuous day-by-day flow of shipments of raw materials to Respondent's factory from points without the state and of finished garments from Respondent's plant to points outside the state; that immediately preceding and following a strike at Respondent's plant shipments were much less than for the corresponding period in the previous year.

In the instant case there was no labor disturbance, and, in addition, there was testimony that had there been a labor disturbance there would have been little or no interruption of interstate commerce, because converters could have shipped their goods to other plants in Rhode Island.

II

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDING OF DOMINATION OF EMPLOYEES' FEDERATION.

The Employees' Federation was started by John DeFanti (R-430, A 15) and some of the other employees who thought a local union would be preferable to an outside union which might call them out on a sympathetic strike as in the 1922 strike which ruined them (R-434, Qs 37-41).

DeFanti had had experience in union activities over a period of about twenty years, particularly with the United Textile Workers of the American Federation of Labor and the Quarry Workers Union of the American Federation of Labor, holding various offices as delegate and as officer at various state and national conferences over this twenty year period and even assisted in organizing a union at Bradford Dyeing Association in 1916 (R-431-3).

DeFanti attempted to give people the impression that Mr. Summersby would not deal with the C. I. O. He did this for the purpose of getting employees to join the Federation, although actually Mr. Summersby had never told him that he would not deal with the C. I. O. (R-431, 436).

Those who were interested in organizing the Employees' Federation wanted to know whether Mr. Summersby would recognize the Federation if they had 51% of the employees signed up with it. Simons or DeFanti or both told Mr. Summersby that some of the employees down in the jig room had

some grievances and they wanted to know if they could come in and discuss them with him. This was on Friday, April 2, when Mr. Summersby had just returned from New York. He told them that having just returned from New York he was quite busy and asked if they could go over until next week and it was postponed until Tuesday of the following week (R-474). So this meeting was held on Tuesday morning, April 6th.

Mr. Summersby never even knew Ashworth, the temporary President of the Employees' Federation, before this meeting (R-472, A 397).

Harwick said that he was selected by some of the other men to represent the machine shop (R-180, A 141) and came to that meeting to represent the machine shop or the machinists on any grievances they had and he did not understand that there was to be any discussion of a union at that meeting (R-171).

Azzinaro understood that he attended that meeting to discuss wages and conditions among the Plant A jiggers. He had heard that the Plant B jiggers had a committee (which included Schofield) and had held a meeting with Mr. Summersby on the previous Friday and felt that the Plant A jiggers had a right to have a meeting with him too. He testified (R-185):

> "The three of us, Murano, DeFanti and myself, we went in to discuss our wages and conditions in the shop. I mean we didn't go in for the union at all . . . We went in and told Mr. Summersby about our wages. We didn't like the piece rate for the simple reason, we told him, that we couldn't figure our pays, and the conditions in there at that time were bad. Since then there have been two fans put up and the door has been opened, so that conditions have been remedied to a certain extent.
>
> "Q. 17. During the course of that conversation did the subject of a union come up? A. Yes, it did, just slightly, though. We were in there for our wages."

Mr. Summersby said referring to this meeting (R-474):

> "the main talk was about jiggers. One fellow thought he worked a little harder than the other and according to his pay he didn't get as much as the other, and it was all a matter of the scale of piece work rates and the class of work that they had had. There was another meeting, as I recall it,—I can't remember the name of the person now who brought it up. That was in regard to the steam condition. On a muggy day all of the steam didn't get out of the dye house. Then there was another question regarding showers, I think, and toilets,—could they have some old showers that were down there fixed up again."

It was after Mr. Summersby and Mr. Pawson left the room that the package of cards and circulars was broken open and distributed by DeFanti (R-174, 181, 183). They were in their brown paper wrapping until then (R-180). Temporary officers were then elected (R-183).

With reference to the meeting on the afternoon of April 6th Mr. Summersby said he (R-473):

> "was informed that their committee wanted to know if they could hold a meeting in a room in our plant that was formerly given over to social activities, at one end of the plant. It is a place where they used to play cards, and so forth. They asked could they have that room to have their committee meeting. I found that the room had a lot of storage stuff in it and there were not any chairs available. They wanted to have their meeting at five o'clock and I said, 'Now, I will be going home. You can have my office and make yourselves comfortable. . . . As a matter of fact, I was there in my office with my hat and coat on ready to leave when they came, and I remember the question came up at that time—I was advised that they were organizing a local union and they wanted to know if I would be agreeable to granting them the same privileges I would grant any other union. I told them that I would have to grant them the same privileges I would grant any other union, and if they had 51 percent of the employees in the plant organized in their union

I would be glad to grant them sole bargaining rights, that I would have to grant sole bargaining rights to any union who came to me and demanded sole bargaining rights, if they had 51 percent of the employees organized."

Permission to use Mr. Summersby's office was given when some one of the employees "asked for the privilege," according to the Board's witness Potter (R-217).

The Board's witness Ashworth testified concerning asking Mr. Summersby to attend the meeting in the shipping room on April 7th as follows (R-283):

"As I finished speaking I stated to the employees present that I had asked Mr. Summersby to come there to confer with them or enlighten them on policies on which they would like to know, relative to whether he would recognize the union 51 percent or better, and give us bargaining rights if proven it, and for the purpose of, as I said, conferring, and so forth and, you might say, answering questions at that meeting. First when I asked Mr. Summersby to come there he thought it wouldn't be quite proper, but later on he didn't see any reason why it wouldn't be all right, and he agreed. At no time during that meeting that I was speaking was Mr. Summersby present. In fact, we had to wait for him to get there."

Mr. Summersby testified (R-468):

"I told him that I thought that that was somewhat of an imposition on me, that it seemed to me these minor affairs, and so forth, in the different departments, could be headed up through a committee; and I saw no reason why the mechanics of handling these grievances could not be done in that manner, that it seemed too bad that I should have to answer grievances to a whole crowd. But I told him that I would do it if he absolutely insisted on it.

"Q. 375. Whether he said he thought it was important that you should do so? A. Yes.

"Q. 376. Was the place and time arranged when you met those workers who wanted to talk on various grievances? A. He said he thought that it would be a very good idea if there could be a meeting of such a group some day when the shift was changing, and he said he would like to make it at three o'clock on a certain day. And I said, 'All right, if you insist on my doing it, I will do it. I would rather, however, act with a committee in these matters.'

"Q. 377. Was it arranged for some certain day? A. It was arranged for three o'clock on some day. I have forgotten just what date it was."

Mr. Summersby was familiar with the proviso of Section 8, paragraph 2 and the proviso of Section 9a of the National Labor Relations Act (R-468 A 378-9), which provided that employees shall have the right at any time to present grievances to their employer and that employers may permit employees to confer with them during working hours without loss of time or pay. It was for this reason that the employees were paid for the time they were at this meeting.

There was considerable noise and confusion at the meeting in the shipping room (R-219, 179) and some doubt as to what was said (R-213, 391, 182, Q 8, 192, Q 56). Even the Board's Record references on page 26 of its brief as to what was said show (R-176) that people were continually coming in and out and that you couldn't listen properly (R-176), that it happened so long ago that the witness could not remember (R-193), or a reference is given which is not in point (R-258), or what was said is that Mr. Summersby was not "in favor of bargaining with anyone other than his employees" (R-283) rather than a flat statement, as it is stated by the Board, that he would not recognize the C. I. O. Certain witnesses quoted Mr. Summersby as saying he would recognize any union which had 51% of the members signed up, but would not recognize any union which did not have 51% signed up (R-186, Q 21-2, 283-4, 430).

By April 9th the Employees' Federation had a majority signed up and submitted proof of this to Mr. Summersby with a request for recognition, which was given on that date (R-226, 228).

A mass meeting was thereafter held by the Employees' Federation in the Town Hall in Westerly, some five miles from the company plant, on April 11, 1937. At this meeting officers and an executive committee were elected (R-222-3, 233) and a grievance committee was also elected (R-243-4, 246).

After that by-laws were drafted by a committee and these were adopted at a mass meeting of the Federation (R-231, 246-9).

On April 20, 1937, a committee negotiated for affiliation with the Associated Workers of Printing, Finishing and Allied Industries and, after a vote by the Federation to affiliate, a charter was granted by the Associated Workers, May 22, 1937 (R-489, Ex. 44, 569).

Five hundred and two employees signed up anew with Associated Workers (R-488).

After this initiation fees were paid and dues were paid regularly (R-245-6, 255-6, Ex. 45, R-489, 570).

General meetings were held monthly in the Town Hall or Calabrian Hall in the Town of Westerly, and the Executive Committee met at the Bradford Social Club (R-232-233).

During the period of about three months between the recognition of the Federation and the time of the hearing before the Trial Examiner the Federation had accomplished a great deal. Ashworth testified how as President of the Federation himself, he alone, or with members of its Grievance Committee had taken up various matters (R-265-274, 280-281). Thus he testified that with reference to the pay of the jiggers one of the men who had had considerable experience as a jigger was put onto making a survey of conditions in the dyehouse to run a test to see if the method of

figuring their pay could be made less complicated (R-265-6). Another complaint was as to getting the right amount of production out of the friction calenders. Mr. Silvia, the systemizer, checked the operation of this machine and changed the rates and operations so that the workers could get more production on the machine. The men were assured that they would be paid for any yardage thereafter put out by those machines over and above the average number of yards usually handed in and that there would be no reduction for those who did not meet the average yardage (R-266-7). There was a young boy named Arnold, who had been shifted around from job to job in an effort to fit him into the plant somewhere. Apparently he had been insubordinate about taking orders and had been laid off. The committee took up his case right up the line to Mr. Pawson as Mr. Summersby was out of town, although the Grievance Committee felt there was not sufficient merit in the boy's case (R-267-271). On complaint the ventilation in the Plant A dyehouse was remedied by putting more ventilation in (R-271). In the case of Charles Roade, who came into the plant intoxicated one morning, who was a likable fellow and who had not been in trouble before and who the employees were afraid would be discharged for this, Mr. Ashworth took up his case along the line right up to Mr. Summersby and the outcome was that Roade was not discharged (R-272). Ashworth also took up the rates of pay of the inspectors, but found they were asking more than the committee thought they were entitled to (R-273). The discharge of Sandy Terranova for smoking was taken up. This was the first time Terranova had been caught smoking. Terranova was under great expense caring for his sister, who was seriously ill, and had a fine family, and as a result of his efforts Terranova was put back to work the following week (R-272, 273). Ashworth also took up the discharge of Delanoy Roade for posting handbills and as a result Roade was put back to work (R-274-5). He took up

the matter of toilets in Plant A (R-280); then the papering girls wanted their rates changed and Mr. Summersby took this up and had them taken care of by their rate being changed (R-280). One of the outstanding results achieved was when Mr. Ashworth and his committee took up the matter of time and a half for overtime work, which had never been done, and this demand was granted with the increase in pay starting two weeks back (R-281-2). It is submitted that a wide scope of grievances, some of them of considerable importance, were thus taken up by the Federation with the management and those deserving of adjustment were given satisfactory results; certainly an impressive achievement during the period between the formation of the Federation in April and the time of the hearing in July, 1937.

At the time of the hearing the Federation was negotiating on a working agreement which they had about ready (R-229, 264). This was testified to by the Board's witnesses, Potter and Ashworth.

Much of what is said by the Board, starting on page 20 of its brief, is a description of what it claims was discrimination against the C. I. O. or its organizers and is not even a statement of claimed domination of the Employees' Federation which is the subject matter of this portion of its brief. It is submitted that this shows just what the Board has done, namely, taken the existence of the C. I. O. in the picture as a basis for finding such things as domination of the Employees' Federation and discrimination against Nelson and Schofield. It is submitted we must look to the evidence bearing on domination of the Employees' Federation rather than to any testimony concerning discrimination against the C. I. O. to decide the question propounded by the Board on page 20 of its brief whether there is ample evidence supporting the Board's findings that Respondent dominated and interfered with the formation and administration of the Federation.

Let us see just what is meant by domination and interference. Webster's New International Dictionary, 1934, defines domination as—

> "Act of dominating; *exercise of power in ruling*; dominion; sovereignty; supremacy; authority; often arbitrary or insolent sway."

The same authority defines interference as—

> "Act, process, or state of interfering; .... *a meddlesome interference in the business of others.*"

Let us then examine the claims of the Board in its brief to see if we find domination, namely the "exercise of power in ruling" or interference, namely "a meddlesome interference in the business of others."

On page 21 of its brief the Board states that Respondent *threw the full weight of its influence* in favor of an "inside" union. This, of course, is general language, not referring to a specific instance, but tending to stir an impression of domination or interference. The Board there states that an "inside" union had not been thought of. This statement overlooks the statement of the Board's witness Potter (R-229) that while he had never previously made any effort to organize he had talked over the matter of forming a similar organization with others who had, and DeFanti testified (R-432) that in 1916 he with others organized a local in the Bradford Dyeing Association. The Board in this paragraph says that Respondent's employment manager *accused* Nelson of being a ringleader of the C. I. O. The actual testimony (R-133) of the Board's witness Nelson is—"I *know* you're a ringleader of the C. I. O., but you are not going to be fired for it." Even assuming he did state that Mr. Summersby, Respondent's President, would like to talk with the employees who were active in the T. W. O. C. drive, we submit that is not domination of the Employees' Federation. Assuming that Mr. Summersby said he was opposed to outside unions.

yet, we submit, that is not domination of the Federation. On page 22 Mr. Summersby is quoted as saying he favored an inside union and would give such a venture the best cooperation; is this domination or interference with the Federation or merely an expression of his view of such a venture and what his attitude would be toward it? Suppose, as stated by the Board, that Mr. Summersby urged Nelson to propose the formation of a shop union; is that domination of or interference with it? Suppose he did ask Nelson the next day whether he had decided for a local union and assume for the moment that he laid Nelson off and also that he discharged Schofield because of C. I. O. activity; is that domination of or interference with the Employees' Federation?

On page 23 of its brief it claims that a dozen or so employees attending the meeting which was held in Mr. Summersby's office on the morning of Tuesday, April 6th, were *selected by Respondent*. It is submitted that none of the Record references given support such a statement.

As to any claim that foremen instructed members of this group to attend, it should be borne in mind that employees cannot leave their work without permission and that a foreman giving an employee permission to attend a meeting is not instructing him to attend.

Suppose Mr. Summersby did say he would not recognize the C. I. O. and that he would prefer the employees to form their own union; certainly statements hostile to the C. I. O. are not domination of or interference with the Federation, nor is his expression of his preference for a union formed by the employees.

There is no evidence, as stated in Footnote 13a on page 24 of the Board's brief, that the term on the circulars "Committee for Organization of the B. D. A. Employees' Federation" was Respondent's label. The testimony shows that DeFanti and some others were the organizers and DeFanti and these others doubtless chose this label and had it printed

on the circular in the course of and to assist their organizing activities.

The statement of the Board on page 24 of its brief that the employees did not know where this printed material came from should not be the basis for any inference that Respondent furnished it. It is at most a lack of evidence on this point. The testimony shows that these cards and circulars remained wrapped in a brown paper package and were not opened and distributed until after Mr. Summersby and Mr. Pawson left the room (R-174, 180, 183). The language of the Board, "having set the group upon the course Respondent desired", is not a reference to a specific instance, but a conclusion by the Board which, we submit, is not supported by the evidence the Board has referred to. As the Board says temporary leaders were selected after Mr. Summersby left his office. Even the Board states that the *group* selected these leaders.

As to the claim of the Board on page 25 of its brief that *supervisors with the power to discharge* actively participated in *this distribution* of cards and circulars; it is interesting to examine the Board references given in support of this claim. Riddle, referred to at (R-191-2) is shown by the Board's own reference (R-211), to have been merely a man who worked in the tin shed, a subdivision of the grey room, a sort of a straw boss who merely had authority to tell some six, seven or eight men what to do. This is certainly not a *supervisor with power to discharge*. The reference to Pawson (R-193), by reading also (R-194) shows he merely had a package which he gave to another man. (R-204) merely shows that Maxon asked a certain employee whether he had signed the C. I. O. card and whether he had signed the Employees' Federation card, not that he was distributing Employees' Federation cards and circulars as claimed. Also, the Board's own reference (R-272), shows that King was the foreman over Maxon. (R-391) shows that Meikle was a shader; also that he merely

asked whether a certain employee signed Employees' Federation card. Yet these references are cited to support a claim that supervisors with the power to discharge actively participated in the distribution of Employees' Federation cards and circulars.

Cards were passed out (with no objection on the part of the management) and membership solicited during working hours by the C. I. O. with intimidation to procure membership on the part of the C. I. O. (R-250, Q 418-420) (R-132, Q 8) (R-77, Q 30-33) (R 133, Q 50-53).

As to posting of the circulars on bulletin boards, these bulletin boards were available for the posting of all kinds of papers employees might be interested in (R-221), rather than to paste them up on a wall or post somewhere (R-221).

The management did not give permission to employees to pass out cards or post notices (R-469, Q 382-4) (R-356, Q 39).

The only instance claimed by the Board of Respondent adding to the membership of the committee is in the case of Durfee. The testimony does not support the Board's claim on page 25 of its brief that Mr. Summersby apologized for omitting a representative from the grey room from the morning committee meeting. The Board's own witness, upon whom they relied, quotes Mr. Summersby as saying (R-208): "Mr. Summersby told me he was sorry we were left out, that he had nothing to do with it." The Board's witness Potter, who attended this meeting before Durfee joined it, did not recall Mr. Summersby or anyone asking permission to bring Durfee in (R-218). Of course, Durfee was waiting outside and couldn't know what was said inside the office. Any testimony of his, therefore, that Mr. Summersby secured permission for Durfee to join the meeting is entirely without the scope of knowledge of Durfee.

We have already pointed out, *supra*, how there was considerable confusion and doubt as to what was said by Mr.

Summersby at the meeting in the shipping room, but assuming that he did state plainly and convincingly that he would not recognize the C. I. O. and dwelt upon the advantages offered by the Federation, we submit this is not domination of or interference with the Federation.

Had Respondent declared its objective, which the Board on page 27 of its brief states was achieved two days after the mass meeting of April 7th? We submit that there had been no objective stated. At most Mr. Summersby said he would be in favor of recognizing a local union, but is that domination of or interference with the formation of such a union? Again, is the insertion of a paid advertisement, quite a few days after the attempted sit-down failed, that his employees were not interested in joining the local sit-down strike wave, any domination of or interference with the Employees' Federation? Or was the statement attributed to him, if made by him, to move Respondent's mill if there was any renewal of labor uncertainties, a domination of or interference with the Federation?

On page 28 of its brief the Board states that Respondent originated the Federation. We submit that the evidence is that DeFanti and other employees originated it. The Board states that Respondent selected those who were to form the organization. The only possible evidence of this is of two members of the first committee being told by their foremen to go to the office. We have already explained how this might mean simply the foremen giving permission for the employees to go far away from their work. The only instance that Respondent added to the committee is the case of Durfee and there is no admissible testimony that Respondent obtained permission from the committee or otherwise caused the addition of Durfee. There is no evidence, of course, that Respondent supplied the cards and circulars, nor is there evidence that the company dedicated company time and premises to the Federation campaign. The use of company

premises for certain initial committee meetings and the mass meeting and the use of company time for the latter are all explained hereinabove, and there is no testimony that they were dedicated by the company to a campaign to advance the Federation, nor is there any testimony that Respondent allowed supervisory employees to participate. Any claim of supervisory employees participating is without bringing home knowledge thereof to Respondent so as to present a case of even tacit approval, let alone direct authorization. Again the recited declarations that Respondent would not bargain with the T. W. O. C. were not a domination of or interference with the Employees' Federation.

Again, even if the sum total of any acts as to which this Court may find there was substantal evidence are regarded in the light most favorable to the contention of the Board, yet do we have domination or interference as those terms have been judicially determined? Did any such acts go so far in degree as to constitute domination of or interference with the formation of the Employees' Federation within the meaning of the Act? Let us examine the decisions bearing on this question.

The burden is on the Board to prove by a fair preponderance of the evidence that Respondent had dominated the Federation. *N. L. R. B.* v. *Lion Shoe Co.*, 97 Fed. (2d) 448, CCA 1. It must prove that the acts were committed by the company as principal or as accessory. *Cupples Co. Manufacturers* v. *N. L. R. B.*, 106 Fed. (2d) 100, CCA 8. Although the Board under the Act is not hampered by the usual rules of evidence prevailing in courts of law and equity in the admission of matter in evidence; yet its findings must be supported by substantial evidence.

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The fact that most any type of evidence may be admitted before the Board

> "does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co.* v. *N. L. R. B.* 305 U. S. 197.

The Court is not "bound to accept findings based on evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted." *Ballston-Stillwater Knitting Company, Inc.*, v. *N. L. R. B.*, 98 Fed. (2d) 758, CCA 2.

In the case of *Appalachian Electric Power Company* v. *N. L. R. B.*, 93 Fed. (2d) 985, the 4th Circuit Court of Appeals said:

> "The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

And in the case of *Peninsular & Occidental Steamship Company* v. *N. L. R. B.*, 98 Fed. (2d) 411, the 5th Circuit Court said:

> "It is the duty of the Board to decide the case before it on all the evidence. It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence."

In the case of *N. L. R. B.* v. *Thompson Products, Inc.*, 97 Fed. (2d) 13, the Court said:

> "'Substantial evidence' means . . . . . that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction."

And, of course, the conclusions of the Board must not be contradicted by and at variance with the evidential findings. *N. L. R. B.* v. *The Sands Manufacturing Company*, 96 Fed. (2d) 721, CCA 6. Nor can the Board reach its conclusions on findings of fact arrived at by accepting part of the evidence and totally disregarding other evidence. *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153, CCA 9.

Our case does not present the situation of that presented in *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, or in *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, No. 20, this term, decided Dec. 4, 1939, of joint control vested in the management by the provisions of the by-laws.

The Board claims on pages 28 and 29 of its brief that certain actions constituted interference with and domination of the formation of the Employees' Federation. As to its claim that Respondent selected and added to the organizing committee of the Employees' Federation we have only two claimed instances of selecting and only one claimed instance of adding to the organizing committee by Respondent, and we have already explained how the claimed selection was merely the foremen giving permission to two employees to leave their work for the purpose of attending this meeting and how there is no evidence that Mr. Summersby secured permission of the committee to add Durfee to it.

As we have pointed out, there is no evidence whatever that Respondent supplied the cards and circulars. We have already explained how Respondent came to permit use of company premises for certain meetings and why the em-

ployees were paid for their time in attending the shipping room meeting, which, as Mr. Summersby understood it and as Mr. Ashworth testified, was for consideration of grievances. There has been no showing that any supervisory employees who were claimed to have distributed Federation cards had any power of discharge.

We then come down to just two points on which the Board might *claim* (which claim we dispute) to have substantial evidence to support it, namely (1) that Respondent expressed its preference for a local union and (2) that its supervisors distributed Federation cards.

The expression of an opinion by an employer does not constitute interference. In *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153, CCA 9, the Court said:

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment. The right of workers to organize freely must be conceded. It is a natural right of equal rank with the great right of free speech, protected by the Constitution. But the *right of the workers to organize is not destroyed by expressions of opinion of the employer* or employee, such as referred to above."

So, even if the testimony should sustain the Board's claim in this connection, such expression of opinion does not constitute domination of or interference with the Employees' Federation as claimed on page 28 of the Board's brief.

As to supervisors distributing Employees' Federation cards, it has been held that solicitation for a company union during working hours on company premises with the supervisory officials assuming a passive attitude toward such solicitation did not constitute domination. *Ballston-Stillwater Knitting Co., Inc.*, v. *N. L. R. B.*, 98 Fed. (2d) 758.

CCA 2. In that case the three who were found to be soliciting membership were found to be people without any authority to hire or discharge.

Even if expression of opinion or solicitation of members were not approved by the above cited cases, how can it be said that they constituted *domination* of the Federation,—in other words, "exercise of power in ruling" the Federation (Dictionary, *supra*) or *interference* with the Federation, namely "a meddlesome interference in the business of others" (Dictionary, *supra*). These are the only charges which the Board makes against Respondent as appears from its question as proposed on page 20 of its brief, and we submit that there certainly is no domination of or interference with the Federation as such words are understood in the English language or under the decisions on such a question.

* * * * * *

The Board on page 30 of its brief stated that the position of the court below in our case is contrary to the decision of this Court in the *Falk* case. In the *Falk* case the Board had ordered a runoff election. In our case the Board has not ordered any election. In the *Falk* case the Circuit Court ordered the local union to be on the ballot; in the instant case the court below neither ordered the Federation to be on the ballot nor did it order an election. In the *Falk* case the Board certified no bargaining representative; in the instant case the Board found the T. W. O. C. to be the bargaining representative. The *Falk* case and the instant case are clearly distinguishable upon their particular facts and circumstances.

It is one thing for a Circuit Court to tell the Board how to hold an election, as the Circuit Court did in the *Falk* case. It is another thing and a matter well within the power of the Circuit Court to vacate certain provisions of the order of the Board because of lack of evidence, as the Circuit Court did in

our case, and if the Circuit Court then chose to indicate to the Board that the deficiency of evidence might be adduced by the holding of an election, the Board should not complain of this, but should welcome the opportunity if it really wants to ascertain the true wishes of the employees. The procedure of remanding the case to the Board for an election was approved in *Ford Motor Co.* v *N. L. R. B.*, 305 U. S. 364, 374 and was followed by this Court in *Hammond* v. *Schappi Bus Lines, Inc.*, 275 U. S. 164, 171; 72 L. Ed. 218, 221, and in the case of *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, No. 20, October Term 1939, decided December 4, 1939, the Board itself contended that a remand to the Board for further proceedings was the proper way to present to the Court additional facts as to the result of an election.

* * * * * * *

It is interesting to note that the Board in its present brief apparently abandons its claim of domination of the administration of the Employees' Federation. The claim of such, presented by the Board in its petition for certiorari, was shown by us to consist of merely a statement of parts of evidence in two particulars by the Board, and when considered in the light of all the evidence of the same witnesses, on the subject, as pointed out by us, any possible claim of domination of the administration of the Employees' Federation falls.

* * * * * *

It is submitted that the above evidence shows a desire on the part of certain employees, such as DeFanti, Simons and Ashworth, to have their own union, that the idea was thought of by DeFanti, a veteran union organizer, and was carried through by him with the assistance of Ashworth. As stated in the case of *National Labor Relations Board* v. *Abell Co.* 97 Fed. (2d) 951,

> "there is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management. In this respect the burden of proof was upon the Union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer . . ."

It is submitted that the evidence here is not such "substantial evidence carrying conviction", when considered in the light of all of respondent's evidence as it must be to support an enforcement order and that the finding by the Board of domination of the Employees' Federation should not be enforced.

III

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT RESPONDENT REFUSED TO BARGAIN COLLECTIVELY WITH THE AUTHORIZED REPRESENTATIVE OF ITS EMPLOYEES IN VIOLATION OF SECTION 8 (5) OF THE ACT. THE BARGAINING PROVISIONS OF THE BOARD'S ORDER THEREFORE SHOULD NOT HAVE BEEN ENFORCED.

The Board found that the Textile Workers Organizing Committee is a labor organization affiliated with the Committee for Industrial Organization (the C. I. O.) and that it admits to membership all Respondent's employees in the appropriate unit (R-648); that under Section 9 (a) of the Act it was designated as their representative for the purposes of collective bargaining by a majority of Respondent's employees in said unit and was on April 4, 1937, and at all

times thereafter had been the exclusive representative of all employees in such unit for such purposes (R-662).

The Board further found that by refusing and continuing to refuse to bargain collectively with said T. W. O. C. as such exclusive representative of the employees in said unit, Respondent had engaged and was engaging in unfair labor practices within the meaning of Sec. 8 (5) of the Act and ordered Respondent to cease and desist from so refusing (R-663).

The Court below vacated said order to bargain

> "since it does not appear that any such an organization as the T. W. O. C.—the branch or affiliate of the C. I. O.—ever came into actual existence with authority to negotiate a contract with the Respondent. . . . The finding by the Board that the T. W. O. C. had a majority of the employees of the respondent signed up even to become members of a union under that name is without substantial evidence on which to rest." 106 Fed. (2d) 688.

A. THE TEXTILE WORKERS ORGANIZING COMMITTEE OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION.

Respondent admits that the production and maintenance employees at its plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9 (b) of the act.

The Textile Workers Organizing Committee was formed early in March, 1937 (R-288, 343, Ex. 34*) by an agreement between the Committee for Industrial Organization and the United Textile Workers of America.

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*Exhibit 34.

AGREEMENT this.....day of March, 1937, between the Committee for Industrial Organization and the United Textile Workers of America.

Paragraph 1 of said agreement provides that a Textile Workers Organizing Committee shall be appointed by the Chairman of the C. I. O., such committee to consist of a Chairman, Secretary-Treasurer, and "such additional members as are deemed necessary by the Chairman" of the C. I. O., some of whom shall be from the U. T. W. of A.

Paragraph 2 gives the Committee power and authority:

(a) To administer existing contracts of the U. T. W. of A.;

(b) To handle the organizing campaign to be instituted on behalf of all textile workers of the country;

(c) To fix initiation fees and dues for new members; to grant dispensation from payment of initiation fees or dues for present members and to determine the destination of fees or dues received by the U. T. W. of A.;

(d) To deal with employers of textile workers and execute agreements on certain bases in its discretion.

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1. A Textile Workers Organizing Committee shall be appointed by the Chairman of the Committee for Industrial Organization. Such Committee shall consist of a Chairman and Secretary-Treasurer, and such additional members as are deemed necessary by the Chairman of the Committee for Industrial Organization, ... of whom shall be from the United Textile Workers of America.

2. The Textile Workers Organizing Committee shall have full authority and power:

(a) To administer outstanding and existing contracts between members and the United Textile Workers of America, or any of its affiliated federations or locals.

(b) To handle all matters relative to the organizing campaign to be instituted on behalf of all the textile workers of this country.

(c) To fix the initiation fees and dues for all new members, and to grant dispensation from the payment of initiation fees or dues for present members, and to require, if it so determines, that all initiation fees or dues that may come into the United Textile Workers of America from any other source, shall be turned over to the Textile Workers Organizing Committee for campaign purposes.

(d) To deal with employers of textile workers and execute agreements on an industry, employer or any other basis in the discretion of the Textile Workers Organizing Committee.

Paragraphs 3 and 4 relate to obtaining and disbursing funds for the organizing campaign and to the status of officers and agents of the U. T. W. of A.

Paragraph 5 gives the C. I. O. power to terminate the organization campaign, to disband the T. W. O. C., and to provide for the reorganization of the U. T. W. of A. for the benefit of present and new members.

This agreement was executed by Francis J. Gorman for the U. T. W. of A. and by John L. Lewis for the C. I. O.

Thus was created by joint action of the U. T. W. of A. formerly an A. F. of L. affiliate (R-323), and the C. I. O., a short time before the organization campaign at Respondent's plant, a National Committee to carry on a campaign for organizing the textile industry.

It will be noted that the T. W. O. C. is given power to grant dispensations from payment of initiation fees or dues only "for present members" (Par. 2 (c)); also that membership in the T. W. O. C. is limited to a Chairman, a Secretary-Treasurer, and such additional members as are deemed

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3. The United Textile Workers of America shall turn over its funds to the Textile Workers Organizing Committee to be used in the organizing campaign. The several officers and agents of the United Textile Workers of America shall place themselves under the jurisdiction and orders of the Textile Workers Organizing Committee.

4. The Committee for Industrial Organization shall contribute such sums of money as conditions of the organizing campaign requires. The disbursement of the funds shall be made by the Secretary-Treasurer of the Textile Workers Organizing Committee, subject to rules promulgated by such Committee.

5. The Committee for Industrial Organization shall have complete power and authority to determine the details incident to the termination of the organizing campaign, the disbanding of the Textile Workers Organizing Committee, and the re-organization of the United Textile Workers of America for the benefit of its present members and new members who join during the organizing campaign.

THE UNITED TEXTILE WORKERS
OF AMERICA
By: FRANCIS J. GORMAN
THE COMMITTEE FOR INDUSTRIAL
ORGANIZATION
By: JOHN L. LEWIS

necessary by the Chairman of the C. I. O., with the limitation that certain of such members shall be from the U. T. W. of A. (Par. 1).

The only evidence as to the membership of this Committee is that it consisted of eleven members together with Sidney Hillman and Thomas Kennedy (R-288; R-322).

There is no provision in said Agreement that any textile worker signing even a membership card automatically becomes, without more, a member of this Committee.

The Rules and Regulations of the T. W. O. C. covering the Organization and conduct of local unions and joint boards (Ex. 33, R-342**) are printed in the footnote.

**Exhibit 33.

TEXTILE WORKERS ORGANIZING COMMITTEE

Rules and Regulations covering the Organization and Conduct of Local Unions and Joint Boards of the Textile Workers Organizing Committee of the C. I. O.

* * * * * *

ARTICLE I

Admission of Local Unions

Section 1. A local union may be organized by seven or more persons employed in the textile industry.

Section 2. They shall apply to the National Secretary-Treasurer for a charter, and shall send seven ($7.00) dollars for a charter fee and seal. On receipts of the charter fee, and after approval by the Textile Workers Organizing Committee, the Secretary-Treasurer shall forward the charter to the new local union.

Section 3. Each local union may make its own by-laws provided that they do not conflict with this constitution or the by-laws of this organization.

ARTICLE II

Duties of Local Unions and Joint Boards

Section 1. Each local union or joint board shall hold regular meetings at least once a month.

Section 2. Each local union shall maintain labor bureaus, hold lectures, maintain friendly relations with other labor organizations, and do all in its power to strengthen and promote the labor movement.

Section 3. Where there are two or more local unions of the Textile Workers Organizing Committee in any city or locality, they shall form a joint board; said joint board shall transact all such business for the local union as may be provided in its by-laws, which must not conflict with the constitution of

Article I provides for the organization of local unions and the method and cost of obtaining charters from the T. W. O. C.

Article II fixes the duties of local unions and joint boards.

Article III regulates inter-local relations.

Article IV designates what officers shall be annually elected by local unions and joint boards and fixes their qualifications and duties.

Article V regulates membership, limits initiation fees for local unions and joint boards to $10.00, and provides that an

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the Textile Workers Organizing Committee. Such joint board shall be chartered by the Textile Workers Organizing Committee.

ARTICLE III

Interlocal Relations

Section 1. The Secretary-Treasurer shall prepare all necessary books, letterheads, and forms for the use of local unions and joint boards, which shall purchase them.

Section 2. All printing for the General Office and local organizations shall be done strictly in union shops, and shall bear the Union label.

Section 3. Local Organizations desiring financial assistance from one another shall send their appeals to the Secretary-Treasurer. In no case shall a local organization appeal directly to another local organization.

ARTICLE IV

Officers of Local Unions—Their Duties

Section 1. The officers of a local organization, both local union and joint board, shall consist of a President, Vice-President, Recording Secretary, Secretary-Treasurer, Sergeant-at-Arms, three Trustees, three members of Finance Committee, an Executive Board of at least seven members, and a correspondent for the official paper. Officers shall be elected annually.

Section 2. No member shall be eligible to any office in the local union unless at least six (6) months a member in good standing, except in the case of a newly organized local union.

Section 3. It shall be the duty of the President to preside at all meetings of the organization, sign all orders on the Secretary-Treasurer authorized by the body, enforce the rules laid down in this constitution, and transact other business usual to the office of President.

Section 4. It shall be the duty of the Vice-President to perform the duties of the President in the event of his absence. Upon the death, removal or resignation of a President, the Vice-President becomes the President until the next general election.

Section 5. It shall be the duty of the Recording Secretary to keep a correct account of the proceedings of the organization, which shall include a report

initiation fee of $1.00 shall be paid to the T. W. O. C. for each new member.

Article VI entitled "Finance" provides *inter alia* that local unions shall pay in advance to the National Secretary-Treasurer a per capita tax of 50 cents per month for each member, regulates the issuance of stamps, making of assessments, etc., etc.

Article VII deals with the destination of all property whether general, joint board, or local union, etc.

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of the Secretary-Treasurer, the receipts and disbursements as well as the number of each voucher issued. He shall keep a special book, in which shall be recorded the names of all persons rejected, suspended or expelled, specifying the offense on which each action was taken; conduct the correspondence of the organization, keep copies of it on file and perform such other duties as the organization may direct. He shall read all documents and correspondence for the organization and keep them on file for future reference. He shall have charge of the seal of the organization and attach it to all documents requiring authentication.

Section 6. It shall be the duty of the Secretary-Treasurer of each local organization to keep a record of all finances, to collect money due to the organization. The monies received must be deposited immediately in such bank as the organization may direct in the name and number of the local organization. He shall pay all bills by check. He shall prepare and send monthly to the National Secretary-Treasurer a list of all members initiated, transferred, dropped or withdrawn during the period for which report is made. He shall draw up quarterly financial reports and submit the same to the local organization. He shall, on demand of the Auditor of the Textile Workers Organizing Committee, produce his books for examination. The Secretary-Treasurer shall report in writing, at each regular meeting of the local organization the money received, paid out, and the amount still on deposit, and deliver to his successor in office all monies and other property of the organization.

Section 7. All officers, shop chairmen and employees of the joint board, or local unions, either directly handling or entrusted with the safekeeping of funds, shall be bonded by the National Office, the premiums of such bonds to be paid for by the respective joint boards or local unions. The amount of these bonds shall in every case be large enough to fully indemnify the organization upon proof of loss.

Section 8. It shall be the duty of the Sergeant-at-Arms to maintain order, inspect the membership books, and perform such other duties as are usual to the office.

Section 9. It shall be the duty of the Board of Trustees to supervise the funds and property of the organization, and, together with the Secretary-

Article VIII provides:

"Sec. 1. Members who are employed all or part of the time must pay dues in advance. Working members are not in good standing who owe one month's dues."

Sec. 2 provides in part:

"Members 3 months in arrears shall stand suspended from all rights and privileges of membership."

There is no question but that the employees of Respondent who are claimed to have been enrolled as members of the

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Treasurer, assume charge of all surplus money. At least two members of the Board shall countersign all checks drawn by the Secretary-Treasurer on account of the organization.

Section 10. It shall be the duty of the Finance Committee to examine all bills presented to the organization, to examine at the end of each quarter the accounts of the organization and submit a full report of the local organization.

Section 11. The local officers shall produce the books of the local union or joint board when demanded by a National Officer. Failure to do so within twenty-four (24) hours shall hold the local officers of the local union or joint board liable to suspension.

Section 12. The Executive Board shall be composed of at least seven members. They shall transact all business of the organization when it is not in session, faithfully execute the orders of the organization, adopt measures in the interests of the organization, and recommend such action to the organization as they may deem necessary for its interests. All acts of the Executive Board shall be subject to ratification by the organization.

ARTICLE V

Membership

Section 1. A candidate, male or female, for membership in the Textile Workers Organizing Committee, must be no less than sixteen (16) years of age and must be employed in the textile industry.

Section 2. No local union or joint board shall charge new members an initiation fee higher than ten ($10.00) dollars. The initiation fee to be paid to the Textile Workers Organizing Committee for each new member shall be one ($1.00) dollar.

Section 3. No person who has been suspended or expelled by a local union shall be eligible for membership until all matters are settled to the satisfaction of the local union having the grievance against the person.

Section 4. No member of the Textile Workers Organizing Committee can be a member of more than one local union at the same time.

Section 5. Persons working at the trade in towns where there are not enough to form a local union, or where a local union has lapsed, shall be allowed to join the nearest local union.

T. W. O. C. and w .o, it is claimed, authorized the T. W. O. C. to act as their representative in collective bargaining were employed all or part of the time; hence, under Section 1, just quoted, it was required that before they could become members of the T. W. O. C. they must pay dues in advance; and further that any member of the T. W. O. C. at Respondent's plant was not in good standing if owing one month's dues.

The evidence shows that all employees there who signed T. W. O. C. cards did so prior to April 10, 1937 (Ex. 30, R-340, 534), and it is admitted that no signer paid dues.

Section 6. No foreman or forewoman, or any other representative of the employer, shall be eligible to membership in local union or in the Textile Workers Organizing Committee.

Section 7. No person who has been an employer or who has worked as foreman or contractor or in any other capacity as employer's representative shall be eligible for office, of whatever description, local or otherwise, for five years following the date of his severance of any of the aforesaid relationship.

Section 8. Any member of the Textile Workers Organizing Committee leaving the trade and not in the employ of the organization shall have no right to participate in any of the activities of the organization while he is out of the trade and while he is not in the employ of the organization.

Section 9. The dues or assessment card or book, in which are placed the stamps showing receipt of such payments, shall be considered the property of the Textile Workers Organizing Committee.

ARTICLE VI

Finance

Section 1. All local unions shall pay in advance to the national secretary-treasurer a per capita tax of fifty (50c) cents per month for each member. Local unions shall make such contributions to the campaign to organize the workers of the textile industry as they may agree upon.

Section 2. The national secretary-treasurer shall, upon receipt of per capita tax, issue monthly stamps, these stamps to be placed in the official dues book of the members of the Textile Workers Organizing Committee, as a receipt for the per capita tax paid. When the dues or assessments of a member are received by a local union, said local union shall make an entry thereof in a book for that purpose.

Section 3. All assessments shall take precedence over per capita tax.

Section 4. All orders for due stamps and supplies except labels, must be accompanied by check, express or post office money order.

Section 5. Every member of the Textile Workers Organizing Committee shall subscribe for one of the official journals of the organization, the subscription for it to be paid at the same time and in the same manner as the weekly or monthly per capita tax, as is provided for in section one of this article.

This matter came on for hearing before the Examiner July 12, 1937, more than three months subsequent to April 10; hence, under said Sec. 2 members of the T. W. O. C. at Respondent's plant, if any, stood suspended from all rights and privileges of membership, which would include the right to designate representatives for the purposes of collective bargaining.

A consideration of the Agreement and the Rules and Regulations indicates, it is submitted, a purpose on the part of

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Section 6. Whenever a joint board or local union decided to levy an assessment or tax upon its membership, it shall immediately notify the National Office of that fact, and give full particulars in connection with such assessment or tax.

Section 7. The National office shall provide uniform assessment or tax stamps to be used by all local organizations for such collections. No local organization shall collect an assessment of tax without issuing a stamp to serve as a receipt for the payments made by the member. Local unions or Joint Boards shall purchase those stamps from the National office which shall sell them at cost.

Section 8. All payments of such assessment or tax shall be entered in the day book and recorded on the member's ledger card or ledger pages in the same manner as the payment of dues is recorded, and the stamp as provided by Section 7 shall be affixed and cancelled in the space provided therefor in the members' dues books. No joint board or local union shall print its own stamp for the above purpose.

ARTICLE VII

Property

Section 1. All general or joint board or local union officers shall deliver to their successors all properties and monies of the Textile Workers Organizing Committee, local union or joint Board, and shall not be released from their bonds until they have done so. Any officer or member found guilty of appropriating funds of the Textile Workers Organizing Committee shall be expelled and legally prosecuted.

Section 2. All charters, local seals and other records, books and forms maintained by local unions or joint boards shall remain the property of the Textile Workers Organizing Committee.

Section 3. Any officer or member of the Textile Workers Organizing Committe who illegally supplies or issues, or aids in illegally supplying or issuing, the union label, shall, upon conviction thereof, be legally prosecuted by the Textile Workers Organizing Committee, and shall be barred from membership in the Textile Workers Organizing Committee.

Section 4. In case of dissolution or suspension of a local union, all funds and property shall become the property of the Textile Workers Organizing Committee.

those who inaugurated the T. W. O. C. to organize local unions and joint boards which would be subsidiaries of the T. W. O. C.; that the T. W. O. C. was a National Organization, membership in which by textile workers could be secured only through local unions or joint boards chartered and organized in accordance with its Rules and Regulations. There is no provision in either the Agreement or Rules and Regulations that a textile worker merely by signing a membership card, without the payment of initiation fees or dues, became *ipso facto* a member of the National Committee; on

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ARTICLE VIII

Members in Arrears—Reinstatement

Section 1. Members who are employed all or part of the time must pay dues in advance. Working members are not in good standing who owe one month's dues.

Section 2. Members three months in arrears shall stand suspended from all rights and privileges of membership. If after three months more the member fails to meet his or her obligations, the name will be dropped from the roll, provided the member is given one week's notice by the local union by registered mail at his or her last known address.

Section 3. Any member who has been dropped from the roll can be reinstated only by paying the regular initiation fee, together with all the money due the organization at the time his name was dropped from the roll, unless otherwise decided by local union or joint board.

ARTICLE IX

Section 1. Any member in good standing for at least six months desiring to leave the country or quit the trade, and able to prove his intention to the satisfaction of the organization, shall be allowed to withdraw from membership by paying all debts to date of withdrawal and by surrendering his membership book or card to the local union or joint board.

Section 2. A member receiving a withdrawal card loses all rights and privileges of membership in the Textile Workers Organizing Committee, and is exempted from paying dues and assessments. In the event of his rejoining the organization within one year, he shall begin paying dues from the date of his rejoining.

Section 3. A member rejoining his local union on a withdrawal card after one (1) year shall be treated as a new member.

ARTICLE X

Clearance Card

Section 1. Any member desiring to travel and transfer his membership, shall apply to his local organization for a clearance card for a stated time, not to exceed three months.

the contrary, the obvious plan was that in order to obtain membership textile workers must proceed in accordance with the Rules and Regulations first by obtaining a charter and then paying initiation fees and dues, and performing all other obligations specified.

Salerno's testimony (R. 287) that employees of Respondent were on July 12, 1937, members in good standing of the T. W. O. C. although up to that time they had paid neither dues nor initiation fees; that it was the policy of the T. W. O. C. not to charge initiation fees or dues "until and unless a collective bargaining agreement, oral or written, has been consummated with the employer" and "until wages, hours and other conditions of employment have been adjusted to the satisfaction of both parties" (Q. 7), and that after that is done a local may be chartered, is, Respondent contends, completely refuted by the terms of the Agreement and the Rules and Regulations.

Salerno admitted his ignorance of these Rules and Regulations when he testified on July 12 that he knew of no Rules or Regulations of the T. W. O. C. He further testified that they had adopted no constitution (R-323).

Salerno recognized the necessity of a charter before operatin in Rhode Island. He testified (R-329):

> "In order to operate in the State (Rhode Island) we do get a charter from the national office in New York, which has authority to grant charters to the various states—to the textile workers in the various states."

Nowhere, either in the Agreement or Rules and Regulations, is there a provision that members may be taken into the National Organization of the T. W. O. C. unless by "appointment by the Chairman of the Committee for Industrial Organization," or the issuance of a charter, and payment of initiation fees and dues.

Later, Salerno testified as to the Rules and Regulations of the T. W. O. C. (R-331):

X-Q. 197.: .....

"A. As I said, I don't know whether they have been issued, because in the formation of this Joint Board, for all practical purposes I have guided myself by the constitution and the practice of the Amalgamated Clothing Workers of America, of which I have been an officer for 17 years."

So far as appears in the evidence there is no connection whatever between the T. W. O. C. and the Amalgamated Clothing Workers of America, and no authority given T. W. O. C. representatives so to operate.

Salerno's testimony (R-286-287) that he was Director of the T. W. O. C. for the State of Rhode Island with authority to admit members into the National Organization and to waive chartering of local organizations and the payment of initiation fees or dues until such time as he had obtained a collective bargaining agreement with an employer were self-serving declarations clearly inadmissible, which not only find no support in the evidence, but are definitely refuted by the terms of the Agreement and Rules and Regulations.

With the exception of Salerno's statement (R-286) there is no evidence whatever that Salerno was "Director of the Textile Workers Organizing Committee of the C. I. O. for the State of Rrode Island" or that he had authority to represent the T. W. O. C. in Rhode Island.

Neither the Agreement nor the Rules and Regulations makes any provision for the appointment of a Director of the T. W. O. C. for the State of Rhode Island or elsewhere, nor is there any provision in either of those instruments authorizing anyone to accept members in the Organizing Committee or to waive chartering of local organizations, payment

of initiation fees and payment of dues. Salerno attempted to establish his authority to represent the T. W. O. C. by introducing a photostat copy of a Charter issued by the Textile Workers Organizing Committee to the Textile Workers of the State of Rhode Island (Ex. 26, R-291).

This Charter constitutes the Union named and known under the title of Joint Board of the State of Rhode Island Textile Workers Organizing Committee of the Committee for Industrial Organization, for the purpose of effecting a thorough organization of the industry. Said Charter authorizes said Board, among other things, to enact by-laws for its government under the constitution, laws, rules and regulations of the T. W. O. C., which in turn binds itself and its successors to support said Joint Board as a *subordinate* organization. (italics ours.)

Thus in the only instance where the T. W. O. C. mentions an inferior organization it terms it "subordinate" and not "affiliate."

Whether the textile workers of Rhode Island ever accepted this Charter and organized under it does not appear. The significant thing, so far as these proceedings are concerned, is that the Charter is dated April 17, 1937, which was one day subsequent to April 16, on which date Salerno had his second and last meeting at Westerly with Summersby, Respondent's President, at which meeting Salerno as the pretended representative of the T. W. O. C. and through it of the majority of Respondent's employees sought collective bargaining.

This Charter in connection with said Agreement and Rules and Regulations clearly discloses that at no time when Salerno approached Summersby and demanded collective bargaining did he have authority to represent the T. W. O. C.

There is no contention by the Board that the majority of Respondent's employees authorized Salerno as an individual to represent them.

B THE T. W. O. C. WAS NEVER DESIGNATED OR SELECTED AS THEIR REPRESENTATIVE FOR THE PURPOSES OF COLLECTIVE BARGAINING BY A MAJORITY OF RESPONDENT'S EMPLOYEES.

The attempt by the T. W. O. C. to organize Respondent's employees began after Percy Schofield, a jigger in Respondent's employ, attended a meeting on Saturday, March 27, 1937, where a C. I. O. organizer named Stettin spoke (R-74-7, 89). Schofield, becoming interested in organizing Respondent for the C. I. O., obtained 8 cards which were signed that night (R. 76). The next day, Sunday, he called up Local Branch 22 of the Textile Workers Organizing Committee in a nearby town and from that and another source obtained 700 additional cards. Monday, March 29, he put half of these cards in his lunch box and took them to Respondent's plant when he went to work (R-77). These cards were made available to the Respondent's employees, and on the same day he gave about half of them to Edward Nelson (R. 77 and R. 78), who from that time became his associate in his efforts to organize the Respondent's plant under the C. I. O.

Nelson's testimony is that he obtained about 350 cards from Schofield on March 29, but did nothing until Wednesday morning, March 31, when he came into the plant and distributed cards to employees who started signing them and distributing them throughout the plant; that he continued to do this for several days (R-132).

During that week Nelson and Schofield continued to distribute these cards and endeavored to obtain signatures, with the result that on Wednesday, March 31, Schofield ran out of cards because they had all been distributed. That day Schofield obtained 1000 additional cards and continued the efforts to obtain signatures (R-78), with the result that by April 4 he testified he and Nelson had secured the signatures of 465 or 467 of Respondent's employees (R-81). So far as ap-

pears, with the exception of the first 8 cards; the distribution, obtaining of signatures and discussions took place on Respondent's premises without interference by the management. On Monday, April 5, Schofield went to work and continued to distribute cards (R-81). The cards, as signatures were obtained, were sent away from Bradford to Siroce, a C. I. O. organizer, and later apparently found their way to Providence (R 121, 291).

Neither Schofield nor Nelson, the only employees of Respondent produced as having anything to do with the attempted organization of the T. W. O. C. was an officer of the T. W. O. C.; nor were they "acting in an official capacity", but were active in the organizing activities as "volunteers" (R-309).

The only evidence in support of the Board's finding that the T. W. O. C. was so designated is the fact that some 465 to 482 employees of Respondent had signed two types of cards by April 10, 1937. The cards in question were two colors, white and blue (Exs. 15 & 16, R-77†).

†Exhibits 15 & 16.

oard's Exhibit 15—WHITE membership card.

. C. I. O. COMMITTEE FOR INDUSTRIAL ORGANIZATION C. I. O.

(The Rhode Island Council of the C. I. O. Organizing Committee) 1929 Westminster Street, Providence, Rhode Island, West 1120.

Date 19

I hereby pledge to become a member of an affiliated union of the C. I. O. for the purpose of bettering conditions for all workers. It is understood that by signing this card I will not be obliged to pay any initiation fee or monthly dues until such time as the workers in my plant or department are organized to the extent of at least 60%. I further agree to have the affiliated union act as my collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Name .....

Address .....

Employed by .....

Company

.....

Location

The Board found that the cards were equivalent in effect and that signers of either immediately became a member of the T. W. O. C. and authorized the T. W. O. C. to act as their collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

The difference between the cards is self-evident. The blue card, originating for some reason from the Boston office, (perhaps, because until April 17, 1937, there was no organization of the T. W. O. C. chartered in Rhode Island) is, for whatever it may be worth, an acceptance of membership in the T. W. O. C. and a designation or selection of the T. W. O. C. as the signer's collective bargaining agent with authority to act for him in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Dept. .....

If not working check ☐

.....

Organizer

Board's Exhibit 16. BLUE membership card.

Form No. 9.

TEXTILE WORKERS' ORGANIZING COMMITTEE
OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION
176 Federal Street, Boston, Mass. B. No. 239441

(Date) 19

I hereby accept membership in the Textile Workers' Organizing Committee of the Committee for Industrial Organization and of my own free will hereby authorize the Textile Workers' Organizing Committee, its agents or representatives to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Employed by .....
(Name of Company) (Mill)

Address of Company .....

Department .....

When a blue card was signed the signer apparently received a member's numbered receipt certifying that the signer had accepted membership in the T. W. O. C., which the signer could retain and at any time exhibit as his credential.

On the other hand, the white card makes no reference to the T. W. O. C. and suggests no connection with it; on the contrary, it identifies its origin with the Rhode Island Council of the C. I. O. Organizing Committee, clearly a different organization than the National Committee, styled the Textile Workers Organizing Committee of the C. I. O.

The undisputed evidence is that more than a majority of all cards signed (465 to 482) were white (R-103). Schofield testified that the majority of cards signed were white cards; he could not give an estimate of the percentage, but he did know that there was a majority of white cards.

Branch of Textile Industry .....

If not working check ☐

.....

Name

.....

Organizer

.....

Address

(In perforated square)
B No. 239441
Form No. 9
Member's Receipt
Textile Worker's Organizing Committee
176 Federal St., Boston, Mass.

This is to certify that .....

Name of Member

has accepted membership in the Textile Workers' Organizing Committee of the Committee for Industrial Organization.

Date 19

Organizer .....

The signer says:

> "I hereby pledge to become a member of an affiliated union of the C. I. O. . . . I further agree to have the affiliated union act as my collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment."

The Board found and now contends that such signer immediately became, without more, a member of the T. W. O. C. and authorized the T. W. O. C. to act as his representative for collective bargaining.

There is no substantial evidence to support such a construction of the language of the card. The signer says in effect: I hereby promise to become a member of an affiliated union of the C. I. O., or I solemnly agree to join an affiliated union of the C. I. O., and I further agree to have such affiliated union act as my collective bargaining agent. He does not say: I hereby join the T. W. O. C. or, as in the blue card, I hereby accept membership in the T. W. O. C. and hereby authorize the T. W. O. C. to act for me as a collective bargaining agency.

Further and subsequent action was clearly contemplated by every signer of a white card; the wording does not indicate a present and final action.

A promise to join is a very different thing from joining. A promise to pay a sum of money is not payment; likewise, a promise to join a labor union and after joining to have that union act as one's representative is a very different thing from joining and authorizing an agency, as was clearly contemplated when blue cards were signed.

Tarbell v. *Gifford*, 82 Vt. 222, 72 Atl. 921.

The Board construed the expression, "I hereby pledge to become a member of an affiliated union of the C. I. O." to mean "I hereby accept membership in the T. W. O. C. of the

C. I. O."; and the words "I further agree to have the affiliated union act as my collective bargaining agency" as "I hereby authorize the T. W. O. C. to act as my collective bargaining agency." There is no justification whatever for this forced and unnatural construction of the language used.

It is significant that no signer of a white card testified that before he signed a white card it was represented to him that by signing he was actually joining the T. W. O. C. and authorizing it to act as his representative in collective bargaining or that he so understood when signing, or that such was his intention when he signed.

There is no evidence from either Schofield or Nelson who obtained the signatures on all white cards and who alone were directly concerned in the attempted organization of Respondent's employees that either ever explained to any signer that by signing the white cards the signer was presently joining the T. W. O. C. and authorizing it to act as his or her representative.

The Board's brief (p. 34) states that there is evidence that certain features of the T. W. O. C. practice were explained to those who signed application cards with a reference to 331-333 of the Record.

A reading of the Record discloses that the Trial Examiner questioned Salerno as follows (R-331):

> "Q. 200. In organizing these locals, when membership is solicited, do you explain to the employees just what they are joining?
>
> A. Of course we do.
>
> Q. 201. You tell them exactly what the organization is?
>
> A. Yes. .....
>
> Q. 202. You say in joining a union of this sort, which, as you say is being developed, ... When you ask a man to join the T. W. O. C. does he really know

what he is joining and what benefit he is going to derive from it?

A. Of course, your Honor, he does. .....

Q. 203. When you do solicit membership in these various locals you undertake to explain to the employee just what he is joining?

A. Through circulars, newspapers, radio speeches and oral conversations."

It will be noted that the Trial Examiner did not refer in any of his questions to signers of the blue or white cards, but that he was inquiring regarding the organization of local unions. Salerno does not testify that he or anyone else to his knowledge made any explanation whatever to the signers of the cards under discussion.

At the time the white cards were signed the T. W. O. C. had been in existence for weeks. Its paid organizers were directing this organization campaign. Therefore, if those organizers had intended signers to understand that "affiliated union" meant "T. W. O. C." they readily could have inserted "T. W. O. C." in lieu of "affiliated union".

"Designate" means "to name, to appoint"; its synonym is "specify"; "select" is "to choose, to pick out". Webster's New International Dictionary. Both "designate" and "specify" connote positive, unequivocal action. How can it be argued that there is substantial evidence that the signers of the white cards named or appointed, chose, or picked out the T. W. O. C. as their representative for collective bargaining?

Did Congress intend that a majority of the employees in an appropriate unit without self-organization, without forming a local union, without deliberation, without concerted action of some kind should so casually choose a representative who could without their participation or knowledge or approval bind them in matters of pay, wages, hours and other conditions of employment?

Did Congress intend that the minority of employees not joining in the designation or selection of representatives should be bound by a representative designated or selected in this way?

Does not Sec. 2 (4) of the Act defining representatives mean that the labor organization designated or selected to act as the representative of employees shall be (5) an organization "in which employees participate"?

In Senate Report 573, 74th Congress, p. 14, is found this statement:

> "Another protection for minorities is that the right of a majority group through its representatives to bargain for all is confined by the bill to cases where the majority is actually organized 'for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.' An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill."

C. RESPONDENT DID NOT REFUSE TO BARGAIN COLLECTIVELY WITH THE T. W. O. C. WITHIN THE MEANING OF SEC. 8 (5) OF THE ACT.

The Board found that Respondent at all times since April 4 had refused to bargain collectively with the T. W. O. C. as the representative of its employees contrary to the provisions and intent of Section 8 (5) of the Act (R-660) and that by such refusing and continuing to refuse to bargain collectively with the T. W. O. C., as the exclusive representative of the employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of said section (R-663).

There is not a scintilla of evidence either that respondent was informed that T. W. O. C. claimed a majority of its employees or that anyone representing T. W. O. C. ever ap-

proached Respondent requesting collective bargaining until Salerno's conference with Mr. Summersby, Respondent's President, in the Biltmore Hotel, Providence, on April 13th, 1937, four days subsequent to the grant on April 9th of bargaining rights to the Federation.

The question presents itself whether Respondent was obliged under the Act to take the unsupported word of a stranger, not an employee, who claimed to be the representative of a majority of its employees for collective bargaining and immediately proceed to deal with him, or whether Respondent had a right to require such reasonable proof of Salerno's authority as would be required in an ordinary business transaction from an individual who represents himself as the agent of another and presents himself for the purpose of doing business for the account of his principal.

Respondent contends that when Salerno presented himself to Summersby claiming the designation of T. W. O. C. by a majority of his employees, the latter had a right not only to inquire as to his authority but to demand proof of it before proceeding to bargain collectively with him as the representative of a majority of his employees or to sign a contract and that Respondent had the right to be reasonably assured that he was not being imposed upon by Salerno, both for his protection and the protection of the non-assenting minority.

Salerno first approached Summersby April 13 (R-291).[1]

The conference was attended by Bernard, a United States Labor Department Conciliator, and two others, none of whom appeared as witnesses (R-292).

[1] Salerno testified from recollection that it was about the 7th of April, a Thursday or a Friday, towards the latter part of the week, when he met Summersby at the Biltmore Hotel (R-292) but, from a memorandum kept of a telephone message in the course of business (Ex. 40, R-461, 568) and from the daily charge sheets of Mr. Slade, counsel for Respondent, kept in the course of business (R-429), the proof is definite that Mr. Salerno was mistaken in his date and that the date of the meeting was the 13th of April. This telephone message was the first time that Summersby had ever heard of either Salerno or Bernard.

Until April 13 Summersby had never seen either Bernard or Salerno (R-452; R-454).

Salerno testified that collective bargaining and recognition of the T. W. O. C. was discussed with Summersby and that Summersby said

> ". . . If you claim you have the majority of my employees, I will recognize you and deal with you, but how many have you got?"

To this Salerno replied:

> "I know I have a majority" (R-293).

Salerno quoted Summersby as saying:

> "If you have a majority of members, I will give you collective bargaining" (R-294).

Summersby suggested to Salerno that he arrange an affiliation of the Federation with the C. I. O., to which Salerno replied (R-455):

> "No. We have got a lot of cards and we want you to sign up on a C. I. O. contract."

To this Summersby replied (R-455):

> "Where are your cards? Where is your proof that you have any of my employees enrolled in your union? He said, 'Oh, we have got the proof.' I said, 'Why don't you present it to me? If you have this proof why haven't you come and presented it to me as this other union has?'"

On cross examination Salerno was asked:

> "X-Q. 56. Did you offer to show him the signed application cards so that he might satisfy himself as to what percentage you had?
>
> A. No. I offered to him that I would gather all the cards that we had signed, of the employees, and I would

offer the cards for proof that we had a majority, to any impartial person that both Mr. Summersby and myself would agree on."

Salerno went on to say in explanation of his refusal to show Summersby the cards:

"A. (to X-Q. 57). My understanding of my function and the function of the organizer of the Textile Workers Organizing Committee is that when the employee signs an application card that remains a secret between the representative of the Union and the individual worker, that in no event will we show the employer a card with the name of the person that signed it, because we know what would happen to that worker if the boss knew he had signed a card with the C. I. O. I did offer to submit the cards to a representative of the United States Government, Mr. Bernard, if Mr. Submersby agreed to submit the B. D. A. FEDERATION cards to any Government agent or impartial person that he would trust" (R 303, 304).

Following that Salerno was asked:

"X-Q. 60. As a matter of fact, didn't Mr. Summersby state in substance, 'You say you have a majority of the workers. Where is your proof. Let me see your proof?' Did Mr. Summersby, in substance, say that?

A. 'How do I know that you have a majority?', Mr. Summersby said. I said, 'I have the cards here in my possession and if we can agree on any one impartial person, we will submit the cards. You submit the signatures of your individual employees and that impartial person will verify whether those are the signatures of your employees or not' " (R-304).

There is no provision in the Act which requires an employer to refer the determination of such majority representation to a Department of Labor Conciliator or to any other person. Respondent, being in doubt, had the right on demand to have the signature cards submitted as proof of majority representation by the T. W. O. C.

Under the rather unusual circumstances of this case, the signed cards were the only available proof of such representation; their presentation to Summersby would have enabled a check by him against his employee pay roll or clock. The examination of the cards and the check against pay roll or clock could have been conducted in the presence of both Salerno and Summersby, Salerno, of course, retaining the cards after the check. Salerno's refusal so to do was unequivocal; hence, Respondent contends it was not obliged under the Act to proceed further with Salerno at that time with reference to collective bargaining.

As a matter of fact, the signed cards were not submitted nor was any list of signers ever produced until the hearing before the Examiner in July (R-340, 534), (Exhibit 30).

Subsequently, on April 16 in Westerly (R-295) there was a second and the final conference between Summersby and Salerno, at which Bernard was again present. Schofield and Nelson, the only two employees of Respondent who had actively participated in the attempted organization of the plant, were asked by Salerno to wait outside and were not at the conference (R-296).

Summersby testified that the three of them (Salerno, Bernard and Summersby) went into a room and sat down and then Salerno said (R-457): "Now, here is the contract. We would like you to sign." ....."He pulled it out of his pocket and passed it to me."

There follows a portion of Salerno's testimony (R-306):

"X-Q. 79. Do you recollect at that conference Mr. Summersby asking you to exhibit your membership cards? A. No. Mr. Summersby wanted to know how many members we had. I said, 'I can prove that I have a majority. I will submit the cards to Mr. James Bernard.' He said, 'How do I know those are signatures of my workers?' I said, 'You have the signatures of your workers on a card index system in your office. You

give Mr. Bernard your index cards with the signatures of your employees. I will give Mr. Bernard the cards that your employees have signed, and whenever it comes to anyone's name he can compare the two signatures and verify whether they are genuine or not.'"

"X-Q. 80. As a matter of fact, didn't you refuse to submit your cards to anyone? A. I refused to submit them to Mr. Summersby because I am not the agent of the employer. I was the agent of the employees."

It was at this conference that Summersby told Salerno he had recognized the Federation.

As above testified to Salerno presented a form of contract which he requested Summersby to sign, by the terms of which the T. W. O. C. was recognized only for its members, but the employer was required to agree not to bargain with any other agency, group or union (R-313).

The two paragraphs referred to were read into the Record by Salerno as follows:

"The employer hereby agrees to recognize the Textile Workers Organizing Committee for its members only in the plant, pertaining to the adjustment of wages, hours and other working conditions.

"The employer hereby agrees not to bargain with any other agency, group or union for the purpose of collective bargaining at its plant" (R-313).

The first paragraph does not require the employer to agree to recognize the T. W. O. C. as the representative of the majority but to recognize it "for its members only in the plant, pertaining to the adjustment of wages, hours and other working conditions"; hence, when Salerno proposed to Summersby that he should sign a contract in this form, Salerno was not acting within the scope of the authority which he claims the majority had conferred upon the T. W. O. C.

If Respondent had signed the agreement he would have been obliged (under the first paragraph) to recognize the

T. W. O. C. even though it had only a dozen members, in the matter of adjustment of their wages, hours, and other working conditions.

By the second paragraph Respondent was required not to bargain with any other agency, group or union for the purposes of collective bargaining. The result of this provision would have been that a small minority of Respondent's employees could have functioned as the collective bargaining agency for all employees in the plant and that if a majority of Respondent's employees had joined another union, such majority would have been precluded from the benefits of collective bargaining secured to them by Sec. 9 (a) of the Act.

Salerno's comments on the effect of the agreement are as follows:

> "X-Q. 113. .....It gives us recognition only for our members, but it prevents the employer from a roundabout way, by the back door, to finance, foster and cause trouble, through another group or agency, to undermine the status or the standard of the Textile Workers Organizing Committee" (R-313).

He also explains:

> X-Q. 112. "Workers there who do not belong to the union" may "represent themselves as individuals" (R-313).

Salerno evidently regarded himself as having full authority to negotiate wth Respondent a written contract of his own drafting, containing such terms, provisions, and conditions as he saw fit, including provisions relating to rates of pay, wages, hours of employment, entirely independently of and without the approval or knowledge of or conferences with his principals.

As to his procedure Salerno testified (R-320, 321):

> "My procedure in the State of Rhode Island wherever a plant has been organized, we *let* the workers themselves choose representatives from their ranks". (Italics ours.)

By "organized" Salerno meant what he attempted to do with Respondent.

He testified further (R-319):

> "Q. 142. If an agreement had been secured from the Bradford Dyeing Association (U. S. A.) to recognize the Textile Workers Organizing Committee of the C. I. O. as the sole bargaining agent, was it the intention of the Textile Workers Organizing Committee of the C. I. O. to establish a local union here or to affiliate with a nearby union?
>
> A. To establish a local union here in Westerly, have one local union for the entire plant at the Bradford Dyeing Association, have the employees of the Bradford Dyeing Association choose their officers, a president, vice-president, executive board and a grievance committee consisting of one from each main department for the purpose of adjusting disputes in the plant."

That this was the idea inculcated in one of his two volunteers is shown by the testimony of Schofield (R-117, 118):

> "X-Q. 385. When these application cards are signed by employees, what is the next step to the procedure of making them a part of the C. I. O.?
>
> A. Those are questions I do not wish to answer because you are going to run me into some more stuff that I don't know about.
>
> X-Q. 386. Do you know whether membership cards are then issued?
>
> A. No; they are not. Under the C. I. O. nobody asks for any dues whatsoever until they have got the collective bargaining concession from the management.

X-Q. 387. Do I understand that except for the application cards being signed and turned in to you or other organizers, that that is all that the applicants do and that they do not receive any cards or anything until you have reached a point——

A. With the management.

X-Q. 388. ——with the management?

A. Yes.

X-Q. 389. Then if you reach your bargaining agreements with the management or enter into bargaining with them, at that point does some further step take place?

A. That is all done through the Providence office. It isn't done through us."

A more complete exclusion of employees from participation in their own affairs is hard to imagine; there is no recognition of that "full freedom of association" and "liberty of contract" which the Act sought to secure for employees (Act, Sec. 1); it fails to encourage "the practice and procedure of collective bargaining"; and the workers do not exercise that "full freedom of association" and "self-organization" which the Act declares is the policy of the United States (Sec. 1, Act).

Salerno claimed to be the authorized representative (Director) in Rhode Island of the T. W. O. C. which, he contended, was designated by the majority of employees at Respondent's plant as their representative for the purposes of collective bargaining (Act, Sec. 9 (a)) and therefore the exclusive representative of all of Respondent's employees for collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

His authority, therefore, would seem to have been limited to negotiating a contract with Respondent whereby the T. W. O. C. would be recognized as the representative of the majority of the employees and as the exclusive representative of all employees for purposes of collective bargaining.

The second paragraph of the Contract proposed violates the Act and conflicts with its public policy.

National Licorice Company, Petitioner v. *National Labor Relations Board*, decided March 4, 1940.

D. IF T. W. O. C. HAD A MAJORITY OF RESPONDENT'S EMPLOYEES AT ANY TIME, IT DID NOT HAVE A MAJORITY AFTER APRIL 9, 1937.

The Board found that at all times since April 4, 1937, the majority of Respondent's employees had designated the T. W. O. C. as their bargaining agent. We understand this to mean that regardless of subsequent affiliations of a large number of employees with the Federation, their freedom of action in the selection of representatives was completely nullified by the alleged unfair labor practices of Respondent.

That by April 9 the Federation had in fact obtained a majority is admitted on the Board's brief (p. 13) and is established by uncontradicted evidence. From this it follows that by April 9, the T. W. O. C. had in fact lost its majority because of affiliation with the Federation of employees who had previously signed T. W. O. C. cards.

The argument of the Board is that such Federation majority on April 9 was *de facto* and not *de jure*; that the designation of the Federation by 484 employees (R-561) (Exhibit 18) was a nullity and should not be recognized because of Respondent's unfair labor practices and that the expressed will of the majority of Respondent's employees should be disregarded and the minority recognized.

It is undisputed that a majority of Respondent's employees on April 9 had signed Federation cards and authorized the Federation to act as their sole bargaining agent (Ex. 39, R-428, 561).

The temporary officers of the Federation on that date presented a letter to Respondent stating that more than a ma-

jority of Respondent's employees had enrolled as members of the Federation and requesting that the Federation be recognized as the sole bargaining agent with respect to wages, hours of labor, and general working conditions for all persons in Respondent's employ (Ex. 21 R-226, 515). This letter was accompanied by signed membership cards (R-259).

Respondent checked the signed cards against its list of employees on its time clock and found the number to be 484 (R-259); whereupon Respondent on that day by letter granted a request of the Federation to act as sole bargaining agency for all employees (Ex. 23, R-228, 516).

On April 11 members of the Federation met in the Town Hall, Westerly, and elected permanent officers, including a president, three vice-presidents, recording secretary, financial secretary, and treasurer, who constituted an executive committee (R-222).

By-laws were adopted (R-231) (Ex. 24, R-236, 517), which disclose no management participation in Federation affairs.

About the same time an application had been filled out to obtain a charter for the Federation from the State of Rhode Island (R-230).

On April 20 representatives of the Federation went to Providence, Rhode Island, and negotiated an affiliation with the Associated Workers of Printing, Finishing and Allied Industries (R-231). On April 23 a mass meeting of the members of the Federation was held in the Town Hall, Westerly, and the members voted affiliation with the Associated Workers of Printing, Finishing and Allied Industries (R-230).

A charter was issued to the Federation by said Associated Workers of Printing, Finishing and Allied Industries (R-231) (Intervenor's Ex. 44, R-489, 569) on May 22, 1937, as Local Union No. Sixteen of Bradford to constitute a branch of the Associated Workers of Printing, Finishing and Allied

Industries to be known as the B. D. A. Employees' Federation branch of the Associated Workers of Printing, Finishing and Allied Industries.

The Federation accepted the constitution of the Associated Workers of Printing, Finishing and Allied Industries (R-236), retaining their own by-laws, which they were permitted to do (R-237).

In this organization all supervisory or executive employees are ineligible for membership (R-243).

The Board found that the B. D. A. Employees' Federation, branch of Associated Workers of Printing, Finishing and Allied Industries, is a labor organization within the meaning of Section 2 (5) of the Act (R-662).

Associated Workers of Printing, Finishing and Allied Industries is a national organization affiliated with Machine Printers Beneficial Association (R-525, Board's Ex. 25; R-569, 570, Intervenor's Ex. 44).

Associated Workers of Printing, Finishing and Allied Industries and its local, the Federation, are labor organizations independently established and not under the control of any employing companies. *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 232; 83 L.Ed. 126, 141.

At the hearing Board's witness Potter, financial secretary of the Federation, testified that the Federation was then negotiating on a contract respecting wages and that they were ready to present the contract (R-229, Q 166, 167).

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under § 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had

the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right."

Consolidated Edison Co., 305 U. S. 236.

On April 23 the collection of initiation fees was begun and before May 28, 503 employees of Respondent had paid initiation fees (R-489-570) (Intervenor's Ex. No. 45); subsequently the members began paying dues as appears from said Exhibit.

Two different organizations are both referred to as the Federation; one recognized April 9; the second, a new organization supplanting the former, organized about May 22. was local Union No. 16 branch of Associated Workers, known as B. D. A. Employees Federation Branch of Associated Workers and etc. (Ex. 44, R-569; Ex. 18, R-515).

There is no direct evidence that a single employee was coerced by the management into signing Federation cards on or before April 9; nor is there any evidence whatever that the management interfered with, dominated, or coerced the employees in any of their actions, above enumerated, subsequent to April 9.

Intervenor's Exhibit A (R-641) is an affidavit relative to resignations of employees of Respondent from the T. W. O. C., which was deposited in a stamped, registered envelope in the post office at Westerly, August 17, 1937, addressed to Joseph Salerno, Director, Textile Workers Organizing Committee of the C. I. O., 49 Westminster Street, Providence, Rhode Island. The resignations number 159; a comparison of the names on this Exhibit with Boards Exhibit 30, listing employees who signed C. I. O. cards on or before April 10, 1937, shows that the names of all but twenty-three persons resigning appears on Exhibit 30 (R-534).

Admitting that 482 employees of Respondent had signed T. W. O. C. cards early in April, these 136 resignations, with which it is not shown that Respondent was in any way concerned, left at the most 346 T. W. O. C. members.

A check of the list of employees who signed C. I. O. cards on or before April 10, 1937 (Board's Exhibit 30), totalling 481 (R-534) with Respondent's Exhibit 39, list of employees who signed B. D. A. E. F. cards on or before April 9, 1937, totalling 484 (R-561) discloses the fact that of the 481 signers of C. I. O. cards approximately 251 later signed Federation cards and affiliated themselves with that organization.

A further check of the signers of T. W. O. C. cards with Intervenor's Exhibit 45, showing employees who paid initiation fees and dues to the B. D. A. Employees' Federation, totalling 503, discloses that of the 481 employees who signed T. W. O. C. cards, approximately 255 paid initiation fees to the Federation.

E. RESPONDENT SHOULD NOT BE ORDERED TO BARGAIN WITH THE T. W. O. C.

To order Respondent to withdraw recognition from the Federation without previously holding an election would be one thing, but it is a very different thing for the Board without an election affirmatively to order the employer to bargain with the T. W. O. C. as to which there is, to say the least, very grave doubt, and we submit absolute lack of evidence as to whether the majority of employees wish it as their bargaining representative. If the employees do not wish to be represented by the T. W. O. C., then the Board in ordering the Respondent to deal with the T. W. O. C. would be imposing upon the employees a representative they do not wish and contravening the free choice of representative envisaged by the Act.

The requirement of an election before ordering Respondent

to deal with the T. W. O. C. has been approved by this Court in the cases of *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, and recently in the case of *N. L. R. B.* v. *National Licorice Co.*, No. 272, this term, decided March 4, 1940. Such procedure has also been approved by Circuit Courts of Appeal in the case of *N. L. R. B.* v. *American Mfg. Co.*, 106 Fed. (2d) 661, CCA 2; *Hamilton Brown Shoe Co.* v. *N. L. R. B.*, 104 Fed. (2d) 49, CCA 8.

The chronology of facts in this last case was remarkably close to the facts in our case. The acts complained of were alleged to have occurred between May 1 and June 26, 1937. Before the hearing the Trial Examiner was closed it appears that 90% of the employees had transferred their affiliation. After the hearing the Trial Examiner filed his report on October 18, 1937. The case was decided by the Circuit Court of Appeals in May 1939. In our case the acts complained of were alleged to have occurred in April 1937. Before the time of the hearing before the Trial Examiner the majority of the employees, as shown in evidence, had designated the Employees' Federation. After the hearing the Trial Examiner filed his report in October 1937. Our case was argued before the First Circuit Court of Appeals in April 1939.

The Court stated in the above case:

> "The question presented is whether the Board erred in denying the petition to intervene and to reopen the record and to take further evidence on the issue of whether Local 176 represented a majority of the employees of the Company. . . .
>
> "But in order to restore the *status quo*, it is not essential that the employer should be required to recognize the C. I. O. as the agency for the employees for collective bargaining. It appears that before the hearing was closed, 90% of the employees had transferred their af-

filiation from the C. I. O. to the Boot and Shoe Workers Union affiliated with the A. F. of L.

* * * * * * *

"So, in the instant case, the Board, after giving effect to its order to restore the *status quo* by reinstating the employees wrongfully discharged, and by disestablishing the company union and requiring the employer to cease and desist from recognizing such union as a bargaining agency, *should settle the question as to representation by requiring an election.* We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal. A court of equity will not do useless, unjust, or inequitable things. *In re Hawkins Mortgage Co.* (CCA7) 45 Fed. (2d) 937. Courts do not deal with abstractions. The proceedings here are substantially proceedings in equity in that equitable rules are applicable. *National Labor Relations Board* v. *Cherry Cotton Mills* (CCA5) 98 Fed. (2d) 444. This court is granted power to modify orders of the Board (Section 10 (f))."

In view of the foregoing and of all the facts in the instant case the Respondent should not be ordered to bargain with the T. W. O. C.

IV

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDINGS CONCERNING NELSON AND SCHOFIELD AND ITS ORDER SHOULD NOT BE ENFORCED.

1. SCHOFIELD WAS NOT DISCHARGED FOR C. I. O. ACTIVITY, BUT FOR VIOLATION OF THE NO SMOKING RULE.

There is no positive evidence that Schofield was laid off because of C. I. O. activity; the Board relies on surmise and conjecture in reaching its finding that Schofield was discharged because of C. I. O. activity.

Mr. Summersby definitely testified that he did not discharge Schofield on account of C. I. O. activity (R-446, Q 313), but that he discharged him for smoking (R-446, Q 314).

Schofield had previously been caught smoking twice and had been laid off for a week the first time and for two weeks the second time (R-363-4, Q. 30-37).

Schofield admitted he had been laid off previously for two weeks for smoking and that he realized if caught smoking again, he would get at least a two weeks' layoff if not worse (R-128, A 524 ff).

"The first time I was caught smoking I was laid off. . . . Laid off for two weeks. . . .

"X-Q 529. At the end of the two weeks' lay-off after the first time that you were caught smoking, you came back and went to work again? A. Yes.

"X-Q 530. Did you realize from that time on that if you were caught smoking again you would in all probability at least get a two weeks' lay-off? A. Yes.

"X-Q 531. If not more? A. If not more, yes."

He admitted being caught smoking this time (R-82).

"You went to the locker room. A. Yes.

". . . I was changing my clothes at the same time, when in comes Mr. Hopwood to the locker room, and he caught me smoking."

The Board concedes on page 66 of its Brief before the Court that Schofield committed the offense charged.

Hopwood and Nichols both testified that they saw Schofield smoking in the locker room at the time complained of (R-367, 387). Mr. Summersby says that Schofield admitted to him that he had been caught smoking and that he knew what the penalty for this was (R-465, A 359).

The Board admits on page 66 of its brief that various employees had been laid off at various times for infraction of the "No Smoking" rule. There are numerous instances of this in the record (R-124, Q 479; R-166, Q 350; R-375, Q 177-180; R-378).

The Board makes much of Hopwood's conduct around the time he found Schofield smoking. Even if Schofield had been told by Hopwood, his foreman, as well as by Shawn, his supervisor, to report to Mr. Summersby, in accordance with Mr. Summersby's orders, (which is not clear from the testimony) it was only natural that Hopwood should search out Schofield to hurry him up. Schofield's testimony as to what Hopwood said on finding him "that he had him now" fits in with what one would expect, namely that Hopwood would be relieved to find Schofield to be sure that he would get him promptly to Mr. Summersby's office. Nichols testified that "those were not the words" used by Hopwood (R. 390). Hopwood's testimony as to what he said when he observed Schofield smoking "You damn fool, come outside" (R-363, Q & A 19) does not indicate hostility to Schofield, but rather regret that Schofield had been so careless as to permit himself to be caught smoking a third time, and because Hopwood "could not conceive of anybody being so silly as to permit himself to be caught breaking the no smoking rule for the third time" (R-395). Since Mr. Summersby had sent for Schofield it was only natural that Hopwood should not exercise his prerogative of himself firing Schofield on the spot, but should let him go down and carry on the proposed interview

with Mr. Summersby before anything was done (R-377, A 206). This shows clearly why Hopwood on this occasion did not handle disciplinary action himself. The comment of the Board about Hopwood handling such matters himself on all other occasions seems uncalled for. He stated (R-371), "If I had laid him off he wouldn't have been able to go down there. . . . It was a very knotty problem to decide." And (R-371) "It was a peculiar case and I wanted to think before I did anything . . . in view of the fact that he had to go down to a meeting, I just waited before I did anything." Hopwood's request of Nichols to remember that he saw Schofield smoking was done because Hopwood knew Schofield's character and felt a witness to the fact might be necessary (R-369, X-Q 104) and Hopwood was very much surprised when Schofield at the hearing admitted that he was caught smoking (R-369, X-Q 106).

Nichols, one of the men in the locker room when Schofield was found smoking, testified that he, himself, was not smoking at the moment when Hopwood entered and that Hopwood would not be able to see Johnson, the other one of the three and who was smoking, since from Hopwood's position as he entered the locker room the lockers hid Johnson from Hopwood's view and that, by the time Hopwood reached them, Johnson had held his cigarette down at one side (R-388). Nichols testified (R-393) that it was a well-known fact that if Hopwood caught anyone smoking, they would have to suffer some kind of punishment, either layoff or discharge.

The existence of a rule against smoking and the fact that anyone found smoking contrary to the rule must expect to be laid off or discharged is not detracted from by the fact that some foreman overlooked violations of the rule and that on occasions in former years smoking had been permitted in certain portions of the plant. Schofield admitted that quite a few men had ben caught smoking and laid off from time to time during the six years he had worked at the plant (R-124,

Q & A 479). At one time smoking was definitely permitted in the boiler room (R-165), X-Q & A 332) and also in the yard (R-146, A 139). However, about a year before this occurrence, the rule had been made rigid and a no smoking sign put on the gate reading "No Smoking Within the Gates", thereby making the rule in force throughout the yard and boiler room the same as in the rest of the plant except in the head executive office (R-471, Q & A 395 and R-147, A 141). The Trial Examiner observed this sign when he took a view (Affidavit A, R-629). It was brought out in testimony that there was ample reason for the No Smoking rule, partly because of insurance rates, and the attorney for the Board admitted that such a rule was perfectly reasonable (R-471).

Although Mr. Summersby had originally sent for Schofield to come to his office to discuss further jiggers' working conditions (R-376, Q 205; R-464, Q 357), there was no reason to continue this discussion after Schofield's violation of the No Smoking rule had been reported and Mr. Summersby had discharged him.

The Board refers to Mr. Summersby remarking that it was unfortunate Schofield was caught smoking just when he was organizing the C. I. O. The meaning of this is clear to us, if not to the Board, namely that Mr. Summersby regretted very much to have to act against a man who was trying to organize the C. I. O., but that he had to enforce the No Smoking rule.

The Board's finding is based entirely on conjecture. If Schofield had not been a C. I. O. organizer, there isn't the slightest doubt that his discharge would have been fully warranted. There is no evidence that he was discharged for C. I. O. activity. On the contrary, the testimony is clear that, after at least one previous infraction of the No Smoking rule and a layoff of two weeks and knowing what would result if he were caught again, he was caught again and discharged for that reason and for that reason alone.

1. NELSON WAS NOT DISCHARGED FOR C. I. O. ACTIVITY, BUT FOR TRESPASS, NEGLECTING HIS WORK, INTERFERING WITH THE WORK OF OTHERS, INTERRUPTING CONFERENCES OF EXECUTIVES, INSUBORDINATION AND DEFIANCE.

In the fall of 1936 Mr. Pierce, chief engineer of the plant and the man in charge of maintenance workers, had decided to lay off Nelson when the work was getting slack. Mr. Pierce testified referring to Nelson (R-411-412):

> "We had discussed previously last fall, Mr. Dudley and myself, about Mr. Nelson. Work was getting rather slack and personally I had decided to lay off Mr. Nelson. He was one of the later men in, and also I had found him at various times when I thought he was not particularly interested in his work, that is, he did a whole lot of talking—I am not mentioning union activities or anything of that sort—he did more talking than he really should. But, of course, the Bradford Dyeing Association had always been very lenient toward their help, much more so than some of the places where I have worked previously, and I thought it best to give Mr. Nelson all the opportunity in the world and see if he wouldn't straighten out."

The evidence shows that he was the irresponsible type with no respect for rules or authority.

Nelson was on the shift which worked from 7 A. M. to 3 P. M. It was against the rules for him to be in the plant at any other time. Despite this he came into the plant on Thursday night, April 1, and was thus trespassing and breaking the rules (R-136-7).

Nelson repeatedly left his work, went to parts of the plant where he had no business and talked with and thus interfered with the work of other employees. Suppose ten men like Nelson had acted as he was doing: what would happen to the business of Respondent? Suppose particularly that ten

carpenters out of approximately a total of twelve carpenters acted as Nelson was acting: how would any carpentry maintenance work ever be done and what would happen to the business of Respondent?

On Friday morning, April 2, Mr. Summersby was talking with Schofield and another jigger in the Plant B Dyehouse concerning jiggers conditions. Nelson left his work and came right up and injected himself into this conference. As Mr. Summersby described it (R-446-447):

> "He came right up in front of me while I was talking with Schofield and this other jigger, within probably a foot of me, came right up and stood in front of me like this (illustrating).
>
> "Q. 318. You are illustrating with your arms crossed in front of you and leaning belligerently toward me? A. With my chin out."

Mr. Summersby asked who he was and Schofield said:

> "This is Nelson; he is working with me .... organizing the C. I. O. here."

Mr. Summersby then testified:

> "I told him the talk I was having was of no interest to him, that I was talking with these two men about their conditions and I would suggest that he go back to his job, wherever it was, and go to work. With a surly grin he left."

That afternoon, although Nelson was not supposed to leave his work until 3 o'clock, he testified (R-134 A 28):

> "About seven or eight minutes before three I went down to see Mr. Schofield, and they told me Mr. Schofield and a committee had gone into the office...."

Nelson thereupon proceeded entirely away from Plant B and through the rest of the plant to the office area, through

the outer office and thence to the private office where Mr. Summersby was meeting with a committee of jiggers to discuss with them working conditions in Plant B (R-447).

> "Nelson opened the door of my office and burst into this conference. In his testimony he stated that he knocked on the door, which he didn't do. He opened the door of my office and burst in upon our conference. I asked—I might add that to get to my office he must come through the outer office. He apparently did that without asking anyone's permission."

When Mr. Summersby told him that the conference did not relate to him he left (R-448).

Mr. Summersby then sent word for Nelson to come to his office when he was through work for the day. Mr. Summersby said (R-448):

> "I inquired as to who he was and what he did and if he had been active in the C. I. O. as an organizer, and I was told that he had been in the plant one night without permission, going about talking with people, taking up their time. I thought I would get hold of him and talk to him that evening before he went home. I thought here was fellow who had probably got blown up with authority and just didn't quite know how to handle himself. Just at that period, of course, the papers were full of C. I. O. activities where sit-downers were taking charge of operators' plants, and possibly he was influenced by that. So I sent word for him to come to my office when he was through work for the day."

When Nelson came to his office Mr. Summersby said (R-448-9):

> "Nelson, it isn't the practice for operatives in our plant to come up and burst into conversations that you see an executive or a foreman having with people in the plant. That is insubordination. This afternoon you burst into my office here without any introduction what-

soever, burst right into the conference here, opened the door of my office without being announced or knocking at all, and you were insubordinate, telling me, after I had once told you that the matter didn't interest you, that you wanted to stay and listen just the same. Now," I said, "you are doing some work for the C. I. O. That is all right by me. I don't want you to feel that I have any objection to your organizing in this plant for the C. I. O. But you must act as a gentleman." "Now," I said, "you follow the example of Percy Schofield; he is keeping his feet on the ground and acting as a gentleman". I said, "Now, Nelson, the thing for you to do—you have got a family—is to go home tonight, think this over carefully, try and calm yourself down, and come back here tomorrow morning, take up your work and attend to it and act like a gentelman and show respect for the foremen and the executives here." I said, "Now, you go home, sleep on it, come back and take up your work and act properly, and everything will be all right."

Mr. Summersby did not discharge Nelson as he might well have this first day Nelson was insubordinate and defiant, but instead gave him a fatherly talk, suggesting that he go about his work of organizing, but doing it in a gentlemanly manner as Schofield was doing. At the same time he advised Nelson he had no objection to his organizing the C. I. O. in the plant.

One or two mornings that week Nelson had started work a little late and quit a little early (R-403, A 74).

On Saturday morning, April 3, the morning after Mr. Summersby had given Nelson the fatherly talk, Nelson did not start work until about 7:30, although he was actually in the plant that morning as early as 6:30 (R-400, A 45). Between 7:00 when he should have started work, and 7:30 he went around talking with other employees and holding up their work. He stopped two men from the boiler room and he stopped two machinists and he talked with a man named Olson in the paint shop (R-401, A 54; R-403, A 78; R-398,

A 21). Concerning Nelson between 7:00 and 7:30 that morning Dudley testified:

(R-401) "X-Q. 53. You said that Mr. Nelson had been quite active in the morning after 6:30 in doing something. Just what was that you referred to? You used the word 'active'. A. Well, he talked and answered questions of different ones. When I asked him he said he had been answering questions to those different men. He had to do that, he said.

"X-Q. 54. He was talking about the C. I. O.? A. I don't know. I didn't hear one word he said. He stopped these two men who were from the boiler room in the hallway and he stopped the two machinists, and he talked with this Johnny Olson. I don't know what he was saying to them or anything about it. I knew he was interested in the C. I. O., but I didn't hear anything he said."

(R-403) "X-Q. 78. Between 7:00 and 7:30 did you see Mr. Nelson at all? A. Yes, sir; yes, sir. He was talking to the two machinists about ten minutes past seven, and I see him and Johnny Olson in the paint shop after that, and he was in there some time. Either one of them shut the door, and then they came out after that and Johnny Olson started to work, and I didn't see Nelson start to work. Some time between 7:00 and 10 minutes past 7:00 he might have sawed those boards. I didn't see him."

(R-404) "Q. 85. When Nelson was talking between 7:00 and 7:30 on Saturday morning, was he working at that same time? A. Not at the job I wanted him on.

"Q. 86. Was he working while he was talking with those individuals? A. No.

"Q. 87. Or was he wasting time at that time? A. He was wasting time all the time I saw him until half-past seven."

He may have talked with others without Mr. Dudley, the boss carpenter who was Nelson's boss (R-405, Q. 94) observing it. Finally Mr. Dudley, the boss carpenter, asked him

(R-398, A 25), "When are you going to start work?" Nelson admitted (R-138) that Mr. Dudley questioned him as to when he intended to start work, and when he told him he had helped Alex rip out some pieces "he asked me why I hadn't gone back to the job I worked on Friday with Jim Hermanson." Nelson then quotes Mr. Dudley as saying (R-139, A 75):

> "He told me to go back to work with Jim Hermanson where we had left off the day before."

Boss carpenter Dudley told chief engineer Pierce of this when he met him later that morning and that afternoon Mr. Summersby stopped boss carpenter Dudley and told him he wanted to see Nelson before he should leave at 3 o'clock (R-399).

When Mr. Summersby learned of Nelson's further conduct he said (R-449):

> "Do you mean to tell me that after I talked to that boy in a fatherly manner last night and told him to come back here, pay attention to his work and act as a gentleman, that he has come in here this morning and done this sort of thing? To me that is not only insubordination but defiance."

When Nelson came to Mr. Summersby's office at quitting time that day Mr. Summersby referred to his fatherly talk to him the day before and said (R-450):

> "I told you we had no objection to your organizing a unit of the C. I. O. here. We have no objection to that whatever, nor to the organization of any other union. But after I have given you fatherly advice and told you to come back to work this morning and act as a gentleman and pay attention to your work, then you come in here and don't go to your work until the boss chases you to work at 25 minutes past seven. Now, that isn't only insubordination, but it is defiance, and you should be

discharged for it. But I am not going to discharge you. I am going to give you another chance. I am going to let you take a vacation for two weeks. You go out for two weeks and come back here at the end of two weeks and report as to whether you then feel you are ready to take up your work, have respect for your superiors, not be insubordinate and not keep other people from their work."

Although the employees were not customarily paid until Thursday, Nelson announced that he would stay right in Mr. Summersby's office until he got his money (R-450).

If Nelson, because of his selection as one of the organizers of the T. W. O. C., so conducted himself as if he thought himself immune from discipline and rules and developed an attitude which seriously impaired his own efficiency and that of many of his fellows, his discharge was justified.

During this two week lay-off Nelson committed illegal acts. On April 8 he threatened to stop fuel trucks from making deliveries of fuel oil to the plant and when one of the drivers of these trucks complained that this was just taking bread and butter out of his mouth and giving it to the railroad employees because fuel could be delivered in tank cars over the spur track of the railroad, Nelson said he would stop the railroad first and stop the fuel trucks afterwards (R-417). Nelson threatened to blow up the spur railroad track to prevent oil deliveries by that means (R-351, A 7).

Nelson and Schofield from the road outside the plant while working for the C. I. O. (R-151, A 171) in conjunction with a man named Charles Rhodes working within the plant, attempted on April 2 to stage a sit-down strike, Nelson by "going up and down motioning—going like this (illustrating by waving arms, squatting and standing)," (R-419) and making a motion to sit down (R-422) while Rhodes went up and down inside the plant yelling "Sit down. Sit down. This is a strike" (R-424-5).

Rhodes' attempt to stage a C. I. O. sit-down was not met by discharge of Rhodes. Is that interference with C. I. O. organization?

We thus have the case of a young irresponsible type of fellow, who did not pay strict attention to his work, but was too much inclined to waste the time of himself and others in talking and who had only continued in the employment of Respondent because of what proved to be the unwarranted hope of the chief engineer that he would straighten out, committing a series of wrongful acts, first in being in the plant on Thursday night, April 1, at a time far removed in point of hours from Nelson's own hours of work and thus committing a trespass on private property and breaching the rules which forbade a workman being in the plant except during his usual working hours; on Friday morning, April 2, we have him leaving his work and coming up and interrupting a conversation between the President of the plant and two jiggers; in the afternoon of the same day he leaves his work before quitting time and proceeds some considerable distance away through Plant B and through the outer office and bursts into the President's private office where Mr. Summersby was conferring with several jiggers. Despite a fatherly talk from Mr. Summersby in which Mr. Summersby held up Schofield as a man who kept his feet on the ground and acted as a gentleman, Nelson showed that he was incapable of appreciating and complying with requirements as to diligence about work, observance of rules and insubordination, by neglecting his work and going around the plant the next morning talking with various other employees and thus wasting their time as well as his violation of Mr. Summersby's admonition the night before to "take up your work and attend to it" (R-449).

He did not return at the end of two weeks and inform Mr. Summersby, as he had been told to, and see whether he would then be taken back or not.

The evidence is overwhelming not only that there was ample cause for Nelson's lay-off or discharge, but that he was laid off because of these wrongful acts on his part and not because of C. I. O. activity.

There is no evidence that Nelson was told to take a lay-off because of C. I. O. activity. Mr. Summersby specifically testified that he did not tell Nelson to take a vacation because of C. I. O. activity on his part (R-446, Qs. 315, 316). There is much in the evidence showing that Mr. Summersby was not discriminating against Nelson because of C. I. O. activity. In the talk with Nelson on Friday afternoon, April 2, Mr. Summersby said (R-449):

> "You are doing some work for the C. I. O. That is all right by me. I don't want you to feel that I have any objection to your organizing in this plant for the C. I. O. But you must act as a gentleman." "Now," I said, "you follow the example of Percy Schofield; he is keeping his feet on the ground and acting as a gentleman."

Again on Saturday, April 3, at the time Nelson was given his lay-off, Mr. Summersby said (R-450):

> "I told you we had no objection to your organizing a unit of the C. I. O. here. We have no objection to that whatever, nor to the organization of any other union."

Nelson quoted Silvia, the personnel manager, as telling him that Mr. Summersby was not going to fire him because of C. I. O. activity (R-133).

Boss carpenter Dudley at first hesitated to speak to Nelson about his tardiness in getting to work on Saturday morning, April 3, because he had seen Nelson coming out of Mr. Summersby's office the day before and didn't know but what Mr. Summersby had given him the privilege of talking to the different men about the C. I. O. (R-398).

The Board on pages 623 of its brief states that Respondent advances as the main reason for Nelson's lay-off his asserted lateness in starting work on the day of his discharge. A consideration of the testimony we have referred to hereinabove will show that this is only one of several reasons which made it imperative that Nelson be laid off if some semblance of order was to be maintained in the plant.

The right of an employer to discharge an employee for neglect of duty, interference with the work of others, violation of rules, insubordination, inefficiency and other causes is well established (39 C. J. 86, 89). That this right was not taken away by the National Labor Relations Act is clear from the decision in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 47, 81 L. Ed. 916, in which Chief Justice Hughes states:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees wth respect to their self-organization and representation and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right to discharge when that right is exercised for other reasons than such intimidation and coercion."

This rule was also laid down in the *Associated Press, Petitioner* v. *N. L. R. B.*, 301 U. S. 103.

The case of Nelson was a case not only warranting but requiring on several grounds the lay-off or discharge of Nelson.

In the absence of any positive testimony that Nelson was laid off because of C. I. O. activity, in the face of the testimony referred to that he would not be discriminated against because of C. I. O. activity, in view of positive testimony of Mr. Summersby that he did not lay Nelson off because of C. I. O. activity, and when consideration is given to the fact

that Nelson was not a diligent worker anyway and that during the few days before his lay-off he had repeatedly neglected his work, wasted the time of others, been in the plant when he shouldn't; interrupted conferences between an executive and other workmen, and in the face of warning as to his conduct continued this wrongful conduct and thus, as well as by his previous actions, showing insubordination and defiance, the conclusion is inescapable, and no other conclusion is permissible but, that he was laid off because of violation of rules, leaving work, insubordination and defiance. Clearly the lay-off was eminently justified and was for proper cause, and this Honorable Court should not hesitate for a moment in supporting the decree of the Circuit Court of Appeals in so far as it vacated paragraph 5 a. and b. of the order of the Board and thus denied reinstatement and back pay to Nelson.

2. THE CONDUCT OF SCHOFIELD AND NELSON AFTER THEIR DISCHARGE PRECLUDES THEIR REINSTATEMENT.

Even if Nelson's lay-off had not been warranted in the first place because of his many wrongful acts in neglecting his work, interrupting the work of others, breaking rules, insubordination and defiance and if Schofield had not been discharged for violation of the rules against smoking,—their conduct after the lay-off, and particularly Nelson's conduct on April 8th in threatening to blow up the spur track and to stop fuel oil deliveries by truck (R-153, 351, 417) and the conduct of Nelson and Schofield on April 8th in attempting to stage a sit-down strike in conjunction with Rhodes acting inside the plant (R-153, 356, 417-8, 420-1) comes within the scope of acts prohibited by the decision of this Honorable Court in the case of *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240.

In that case the court said in an opinion by Chief Justice Hughes:

> "We are unable to conclude that Congress intended to compel employers to retain persons in their employ *regardless of their unlawful conduct*,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision."

It will be observed in the *Fansteel* case that the Court did not limit its principle, there announced, to those participating in or aiding and abetting a sit-down, but the Court included "other unlawful acts in order to force compliance with demands" as being acts which placed the employees "outside the protection of the statute." The Court said:

> "Had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge."
>
> "It cannot be said that independently of the Act respondent was bound to reinstate those who had thus aided and abetted the 'sit-down' strikers in defying the court's order. If it be assumed that by virtue of Section 2 (3) they still had the status of 'employees', that provision did not automatically provide reinstatement. Whether the Board could order it must turn on the application of the provision empowering the Board to require 'such affirmative action including reinstatement of employees' as will 'effectuate the policies' of the Act. We are thus returned to the question already discussed and we think that in that respect *these aiders and abettors*, likewise guilty of unlawful conduct, *are in no better case than the 'sit-down' strikers themselves*. We find no

ground for concluding that there is any policy of the Act which justifies the Board in ordering reinstatement in such circumstances."

The action of Nelson in threatening to stop fuel oil deliveries by truck and to blow up the railroad spur track to stop deliveries of fuel oil by rail and his attempt to stage a sit-down strike and Schofield's attempt to stage a sit-down strike are all actions which place them in the same category with those who aided and abetted in the *Fansteel* case, thus making them persons who are not deserving of any reinstatement order from the Board, but with respect to whom any reinstatement order would be contrary to the policies of the Act, since it would encourage employees and others "to resort to force and violence in defiance of the law of the land" rather than to effectuate the purposes of the Act "to promote peaceful settlements of disputes."

Not only do the actions of Nelson and Schofield bar them from reinstatement in the light of the *Fansteel* decision, but the cases cited by the Board on page 72 of its brief do not approve of reinstatement for them. In the first place these are Circuit Courts of Appeal cases and, therefore, of inferior persuasive force to the *Fansteel* decision which was rendered by this Court, and also these Circuit Court of Appeal cases, when analyzed, do not permit reinstatement after the type of acts committed by Nelson and Schofield. In the case of *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, the Circuit Court pointed out that the nature of the altercation in that case was "not of such a type or character as to bring the status of the striking employees within the ruling of the Supreme Court" in the *Fansteel* case. The Circuit Court pointed out (page 176) that there was no sit-down strike and that the altercation was between strikers and non-strikers outside the plant and amounted to little more than a fist fight and that there was no evidence whatever that this fight was part of a plan to force compliance by

he employer with the employees' demands. Also, that there vas no evidence bringing the violence home to members of he local or to anyone connected with them. In our case, on he contrary, there was an attempted sit-down; it was di-ected toward the employer, the employer's business and the employer's property; it was clearly an effort to force the employer to comply with the employees' demands by the use of violence; the act was done by Nelson and Schofield themselves, the very men who were attempting to organize for the C. I. O. union. The misconduct in our case was clearly akin to the misconduct in the *Fansteel* case and not an incidental fist fight between employees. In the case of *National Labor Relations Board* v. *Colten,* 105 Fed. (2d) 179, the Circuit Court stated (page 183) that as to the violence upon the picket line no finding by the State Court of guilty was made, nor any finding that the violence was directed towards seizure of respondent's property, offenders were not identified and the record does not show that the accused employees were discharged by reason of their alleged violation of the injunctional order obtained from the State Court. This is another case of a flareup on the picket line not directed toward respondent's property. Of course, in our case where Schofield had already been discharged and Nelson had already been laid off and, as the Board found, had in effect been discharged, it would have been but an empty gesture to attempt to discharge them again because of their actions after they were no longer working for Respondent. In the case of *Republic Steel Corporation* v. *National Labor Relations Board,* 107 Fed. (2d) 472, the Circuit Court held that an order of reinstatement was improper with respect to employees convicted of malicious destruction of property, those interfering with and obstructing railway tracks, obstructing and retarding passage of the United States mails, etc. It was only as to those employees guilty of minor disorders that the Court held that the Board might reinstate them. The actions in our case are

in line with malicious destruction of property as by attempted sit-down, interference with fuel supplies and threat to blow up spur tracks, and the latter very close to the offense of interfering with and obstructing railway tracks, and were all directed towards Respondent, its property or its business and were by no means the minor disorders referred to in this last case. The *Remington-Rand* and *Carlisle Lumber* cases referred to by the Board on page 73 of its brief were decided by the Circuit Court in those cases prior to and, therefore, without the benefit of the decision of this Court in the *Fansteel* case. The denial of certiorari in those cases does not necessarily mean approval of the decisions of the Circuit Court in those cases. This principle is recognized law.

U. S. v. *Carver*, 260 U. S. 482, 490; 67 L.Ed. 361, 364 (1923);

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; 60 L.Ed. 629, 634 (1916);

Talcott v. *U. S.*, 23 Fed. (2d) 897, 899, CCA 9 (1928).

In the *Carver* case Mr. Justice Holmes said:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore, it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

In the *Remington-Rand* case certain employees "sought without violence to prevent this vote from being taken,"—not violence and not directed against the employer. In the *Carlisle Lumber* decision in 94 Fed. (2d) 138 the Court merely held that employees who participate in a peaceful walk-out strike to sustain their position in the controversy were still "employees" under the Act. In the *Carlisle* de-

cision in 99 Fed. (2d) 533 it was held that the equity principle of clean hands did not apply. In both the *Remington-Rand* and *Carlisle Lumber* cases there was not even a threat of violence. In our case there certainly was.¶

The action of Nelson and Schofield from a position on the road outside the plant at the same time with the action of Rhodes within the plant to attempt to stage a sit-down was clearly a deliberate connected attempt by C. I. O. representatives (R-418, 420) to impose upon Respondent that violence to gain their ends which was disapproved by this Court in the *Fansteel* case. The attempted sit-down failed because Bradford in most instances paid higher wages than competitors (R-228, Q 157) and the employees were content with working conditions (R-58, Q 237) and was the first finishing plant to advance wages (R-466, Q 366). The claim that Nelson is a persecuted employee, whose bitterness may have led him to attempt illegality, is unjustified. We submit the evidence clearly shows and if this Court could have heard Nelson testify on the witness stand, it would be clear that Nelson was the irresponsible type of fresh young man who would quickly disrupt discipline in a plant such as Respon-

¶ The Board in footnote 47, starting at the bottom of page 74 of its brief, says that we cannot raise for the first time in the Circuit Court matter which was not raised before the Board and thus attempts to avoid consideration of the actions of Nelson and Schofield when they were no longer working for Respondent. The very reference which the Board gives in this footnote (R-625), shows that among our exceptions filed in October 1937 to the Intermediate Report of the Trial Examiner was an exception to the Trial Examiner's recommendation of reinstatement and back pay for Nelson and Schofield, wherein we stated that this "totally disregards . . . said Schofield and said Nelson . . . acting in a manner directly hostile to the interests of Respondent, including an attempt to cause a sit-down strike and *otherwise to cause . . . disturbance of the business activity of Respondent . . .*" Thus nearly a year and a half before the decision of this Court in the Fansteel case and, therefore, without benefit of that decision, and some two months before the decision of the Board in our case, we specifically called the attention of the Board in these Exceptions filed with the Board to the attempt to cause a sit-down strike and to the action hostile to and causing a disturbance of the business activity of Respondent. Therefore these actions of Nelson and Schofield must be considered.

dent's. His threats of violence with respect to deliveries of oil, including blowing up the spur track, and his attempt with Schofield to stage a sit-down show how unbalanced he was in his efforts to gain his ends not by the peaceful means stated to be the policy of the National Labor Relations Act, but by force and violence, directed toward respondent, its property and its business. Nelson and also Schofield by their actions have clearly placed themselves outside the protection of the Act and of the remedial action which the Board might otherwise give them.

3. NELSON WOULD HAVE BEEN LAID OFF ANYWAY.

The additional evidence adduced by permission of the Circuit Court of Appeals shows that Nelson would have been laid off anyway at the time of a substantial reduction in the forces of the company on September 17, 1937. This additional evidence was presented in the form of affidavits which, by stipulation of the Board and counsel for the parties, were to be in lieu of further testimony and should have the same force and effect as testimony (R-667).

The first affidavit of H. A. R. Myers, Treasurer of Respondent corporation, given under date of April 9, 1938, stated (R-668):

> "If Edward Nelson had been working continuously for Bradford Dyeing Association (U. S. A.) since April 3, 1937 . . . *he would have been one* of the three carpenters laid off on September 17, 1937 . . ."

It will be seen that there is thus this positive evidence of H. A. R. Myers that Nelson *would have been laid off on September 17, 1937,* when the big layoff of employees took place.

The affidavits submitted by the Board in this connection dealt with the matter of where Nelson stood in order of seniority, thus indicating it would decide the question on

the seniority principle, but the Board then in its Supplemental Findings of Fact and Recommendation discards the seniority principle (R-675-6). Even on a merit basis Nelson was not particularly interested in his work and wasted a lot of time talking, so that the chief engineer had considered laying him off previously in the fall of 1936 (R-411-413). There is no testimony that Nelson would not have been laid off on September 17, 1937, and there is the positive testimony of Mr. Myers in the affidavit above referred to (which it must be remembered was stipulated should have the same force and effect as testimony) that Nelson "would have been one of the three carpenters laid off on September 17, 1937." The Board, therefore, is bound by this statement of Mr. Myers and its findings and recommendation are not supported by any evidence and must be disregarded.

This evidence refers to what took place in September 1937, which was after the hearing before the Trial Examiner for the Board, which was in July 1937, and, therefore, matter which could not be presented in evidence at that hearing; and which was about a month before the filing by the Trial Examiner of his Intermediate Report in October 1937 and some three months before the rendering by the Board of its decision and order on December 22, 1937.

In the case of *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 Fed. (2d) 533, the 9th Circuit Court of Appeals stated:

> "..... the affirmative action must be such as will effectuate the policies of the act. The time when it is to be determined whether or not the affirmative action will effectuate such policies is *the time when the Board makes its order*, for what might effectuate such policies at a previous time might not do so at the time of the order."

The Board at page 52 of its brief before the Circuit Court stated that the only question before the Court was whether the

order of the Board was "lawful when made." *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271.

Since the Board rendered its order under date of December 22, 1937, the fact that Nelson would have been laid off anyway in September 1937, some three months prior thereto, is matter which the Board should have considered in its decision and order and, if considered, would necessarily bar the Board from ordering reinstatement of Nelson.‡

CONCLUSION

It is submitted there is not jurisdiction over Respondent in this matter, but if there is then the decree of the Circuit Court of Appeals for the First Circuit allowing the first three paragraphs of the order of the Board to stand, but vacating the fourth and fifth paragraphs of the order of the Board, at least until an election should be held, was proper and should be affirmed.

Respectfully submitted,

HARRY PARSONS CROSS
GEORGE PAUL SLADE
GREENOUGH, LYMAN & CROSS.

March 1940.

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‡The many cases cited by the Board on page 77 of its brief to the effect that an order of the Board does not become moot merely because it has been obeyed, do not, of course, decide the question which is here being discussed.

The Board's order in full is as follows:

"Upon the basis of the findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Bradford Dyeing Association (U. S. A.), Bradford, Rhode Island, and its officers, agents, successors, and assigns shall:

"1. Cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

"2. Cease and desist from in any manner dominating or interfering with the administration of B. D. A. Employees' Federation or with the formation or administration of any other labor organization of its employees and from contributing financial or other support to B. D. A. Employees' Association or any other labor organization of its employees.

"3. Cease and desist from discouraging membership in Textile Workers' Organizing Committee or any other labor organization of its employees by discrimination in regard to hire or tenure of employment or any terms or conditions of employment.

"4. Cease and desist from refusing to bargain collectively with Textile Workers' Organizing Committee, as the exclusive representative of the production and maintenance employees at its Bradford, Rhode Island, plant, except supervisory and clerical employees.

"5. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"a. Offer to Percy Schofield and Edward Nelson immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges;

b. Make whole Percy Schofield and Edward Nelson for any losses of pay they have suffered by reason of the respondent's discriminatory acts, by payment to each of them of a sum of money equal to that which each would normally have earned as wages from the date of his discharge (i. e., April 6, 1937, and April 3, 1937, respectively) to the date of the respondent's offer of reinstatement, less any amount earned by each during that period;

"c. Withdraw all recognition from B. D. A. Employees' Federation as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and completely disestablish said Federation as such representative;

"d. Upon request bargain collectively with Textile Workers' Organizing Committee, as the exclusive representative of the production and maintenance employees at its Bradford, Rhode Island, plant, except supervisory and clerical employees, in respect to rates of pay, wages, hours of employment, or other conditions of employment;

"e. Post immediately notices to its employees in conspicuous places throughout its plant stating: (1) that the respondent will cease and desist as provided in paragraphs 1, 2, 3, and 4 of this Order; (2) that the respondent withdraws and will refrain from all recognition of B. D. A. Employees' Federation as a representative of its employees and completely disestablishes it as such representative; (3) that the agreement signed with B. D. A. Employees' Federation recognizing it as the bargaining agent for its members is void and of no effect; (4) that to secure or retain employment a person need not become a member of B. D. A. Employees' Federation; (5) that the respondent will not discharge or in any manner discriminate against any employee or applicant for employment because of his membership in Textile Workers' Organizing Committee, or any other labor organization of its employees, or because of his assisting such organization or engaging in union activity; (6) that the respondent has instructed its foremen and other supervisory officials to remain neutral as between labor organizations and that any violations of this instruction should be reported to it;

"f. Such notices shall remain posted for a period of at least thirty (30) consecutive days from the date of the posting; and

"g. Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith."

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. IV, Title 29, Sec. 1512 et seq.) are as follows:

SEC. 2. When used in this Act—

(5) The term "labor organization" means any organization of any kind, or any agency or employe representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing, upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain[1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the

[1] So in original.

decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action (including reinstatement of employees with or without back pay) as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practices, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred

or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of

certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)..

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).